

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1056

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

- against -

74 2573

AMADO LOPEZ,

Appellant.

-----x

AND APPENDIX
BRIEF FOR THE DEFENDANT-APPELLANT

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Please be advised that counsel for the Appellant made a motion for an extension of time to file this Brief that was granted by this honorable court. Counsel for the Appellant had been advised by his client (through communications between his client and his family) on information and belief that Ramiro Gonzalez a Government witness who testified against the appellant communicated with Appellant's family and indicated a desire to recant on the testimony he had given against Appellant at trial.

Counsel wrote letters to Gonzalez inquiring in this regard. Counsel did not know for sure that Gonzalez would not recant his testimony until May 11, 1976 when Carlos Letski, an attorney in Miami, Florida, who was retained by the Lopez family called counsel.

That it is for the above mentioned reasons, and others that a point on this subject has not been included in this brief.

PRELIMINARY STATEMENT

AMADO LOPEZ appeals from a judgment of conviction entered against him on September 18, 1974 in the United States District Court for the Eastern District of New York before the Honorable Jacob Mishler, United States District Judge, and a jury.

AMADO LOPEZ was one of the defendants charged by Indictment No. 74 Cr. 48, a sealed Indictment which was unsealed on February 20, 1974. Said Indictment charged AMADO LOPEZ with conspiracy to import, receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of heroin in violation of Sections 173 and 174 of Title 21, United States Code.

AMADO LOPEZ was sentenced to prison for a term of fifteen years by the Honorable Jacob Mishler on January 9, 1976.

STATEMENT OF FACTS

A. THE PROSECUTION'S CASE

The Government's first witness was Angel Segundo Coronel Del Toro.

Mr. Coronel, "the brains" of a New York heroin distribution organization (T-313), admitted earning well over \$500,000 selling heroin (T-308). Mr. Coronel testified that he sold heroin from April, 1968 (T-118) until November, 1970 (T-242).

Mr. Coronel admitted that he fled from the United States in 1970 and lived in several Caribbean countries. He was arrested in Costa Rica at the end of 1970 on suspicion of being a large heroin dealer and possession of marijuana. He was brought back to the United States and arraigned in Florida (T-243). Coronel stated that only after conviction for narcotics conspiracy, did he decide to cooperate with the Federal Government (T-244). Coronel had not been sentenced on his narcotics conviction at the time he testified at the trial below (T-245).

Coronel never mentioned AMADO LOPEZ on direct examination. On cross-examination, Coronel stated that he never had any narcotics transactions with AMADO LOPEZ (713)

Manuel Noa testified that he sold heroin for Coronel and other suppliers from June, 1968 (T-805) to November, 1970 (T-954, 955, 956).

Noa stated that he knew AMADO LOPEZ, (800) and met him for the first time in Miami in 1966 (802). In June, 1969, Noa received approximately thirty kilos of heroin from Coronel in New York, at Kennedy Airport and allegedly went all the way to Miami, Florida to deliver a half-kilo to AMADO LOPEZ (818, 819). Two or three days prior to this alleged transaction, Noa, who was in New York allegedly called LOPEZ, by telephone in Miami, to inform him that heroin would be delivered (831, 832). Four or five days after the delivery, LOPEZ allegedly paid Noa \$9,000 (833).

Noa testified that in July, 1969, he received twenty-five or thirty-one kilos of heroin (833). Out of this shipment, Noa allegedly went all the way to Miami to sell a half kilo of heroin to AMADO LOPEZ for \$9,000 (859). Noa testified that in November, 1969, he received 25 kilos of heroin, (862, 863). Out of this shipment, Noa allegedly delivered two kilos to AMADO LOPEZ (864) in New York in a car at 171st Street and Broadway (865, 866). Noa

testified that he allegedly met LOPEZ in New York at an apartment on 163rd Street where he was paid a total of \$35,000 by LOPEZ for the two kilos (866).

Noa testified that in December, 1969, he received 25 kilos of heroin from Coronel on 10th Avenue in New York City (874, 875). Following instructions from Coronel, Noa allegedly gave three kilos from this shipment to AMADO LOPEZ (876).

Noa testified that he had a conversation with LOPEZ in Miami before the first sale was made, wherein the following was allegedly discussed:

I told him (Lopez) it (the heroin) was French, that it was good, and he (Lopez) said, "well, let's try out first with half a kilo." (910)

Noa admitted that he was arrested in Florida, convicted of violations of the narcotics laws, and sentenced (957). Noa started to cooperate with the Federal Government on February 8, 1973, after being promised that his testimony would not be held against him, and his cooperation would be reported to the Judge (958, 959).

On cross-examination, Noa stated that he was involved in selling heroin and cocaine since 1965 (968).

Noa admitted reporting a phony salary for Internal Revenue purposes (1030). Noa admitted selling 300-400 kilos of heroin, and earned at least \$300,000. from his sales (1035). Noa also testified as an informant in a trial in the Southern District of New York (1039). Noa admitted that he hoped for a reduced sentence in return for his cooperation (1056). Noa admitted that he "confused one deliver with another." (1098). Noa was serving a twenty-five year sentence in the Atlanta Federal Prison. Upon information and belief, Noa's sentence was commuted after the instant case was tried and "he is on the street".

Roberto Arenas testified that he was in charge of receiving money from heroin transactions when Mr. Coronel was not available (T-1796, 1797, 1798).

Mr. Arenas admitted that he was arrested for narcotics conspiracy on March 6, 1973. After being convicted, Arenas decided to cooperate "since they (the Government) had registered another indictment." Arenas also admitted that he was arrested for income tax violations (T-1926, 1927, 1928). Mr. Arenas testified that he was facing a five to twenty year sentence. Arenas was told that "a recommendation letter to the Judge" would be

written in return for cooperation at the trial below
(T-1930), 1931).

Mr. Arenas testified that he did not even know
AMADO LOPEZ (2042).

B. THE DEFENDANT'S CASE

Isaac Rivero, a cuban expatriate, testified that he was employed by the LOPEZ family in Miami in 1966 (2463, 2464). Mr. Rivero testified that he worked as a waiter in a restaurant owned by the Lopez family on a shift beginning at 11:00 o'clock at night until 7:00 o'clock in the morning. Mr. Rivero testified that AMADO LOPEZ would always come to work at 7:00 o'clock in the morning and that AMADO LOPEZ would relieve him from work at that time (2466). Mr. Rivero stated that he worked in the restaurant in 1968 and 1969, and never saw or heard of AMADO LOPEZ dealing in heroin (2467).

Edwardo Ochoa testified that he had a meeting with Manuel Noa wherein Noa stated: "tell your friend Amado Lopez I have an indictment for him"? (2502).

On cross, Ochoa stated that this conversation occurred in prison in Miami where both the and Noa were incarcerated (2515).

Rigoburto Diaz,^{is} a cuban expatriate who arrived in Miami in 1968 (2518, 2519). Diaz testified that the Lopez family hired Mr. Diaz to work in the restaurant in Miami preparing food in June, 1968. Mr. Diaz continued

working in the restaurant in 1969 and 1970 from 3:00 o'clock in the afternoon until 11:00 o'clock at night and that he regularly relieved AMADO LOPEZ at work (2519, 2520). Mr. Diaz never saw or heard of AMADO LOPEZ dealing in heroin (2521).

Ms. Aurora Garcia identified AMADO LOPEZ (2918), and testified that AMADO has a brother named ARMANDO who resembled AMADO in height, hair color, and facial characteristics (2919, 2920) and that the two brothers were almost identical in appearance.

C. REBUTTAL

Ramiro Gonzalez was called as a rebuttal witness by the Government (2672). He admitted to being convicted of illegally possessing a gun in Puerto Rico in 1968 (2672). He also admitted to being convicted of narcotics violations, and sentenced to two ten year terms in prison, which was later reduced to six years (2673, 2675).

Gonzalez identified AMADO LOPEZ (2675, 2676), and testified that he first met LOPEZ in 1969 in Miami (2678). Gonzalez stated, over defense counsel's objection, that he also met AMADO LOPEZ in New York in April or May, 1970 (2678, 2679).

Over defense counsel's objection, Gonzalez testified that he discussed selling heroin to AMADO LOPEZ in New York in April or May, 1970, but no transaction occurred (2680, 2681, 2682, 2683). Gonzalez also testified to a conversation he had with Manuel Noa concerning AMADO LOPEZ around October, 1970, over defense counsel's objection (2683). The substance of this alleged conversation was as follows: Manuel Noa owed Gonzalez \$15,000. from narcotics transactions. AMADO LOPEZ allegedly owed Noa \$12,500. from narcotics transactions (2684). Noa told

Gonzalez to collect the money from LOPEZ (2686). Gonzalez testified that he met AMADO LOPEZ in New York in the last part of October or the beginning of November in an effort to get the money (2687). After this meeting, Gonzalez met Lopez in Miami, in an attempt to obtain \$12,500 (2703).

On cross-examination, defense counsel attempted to impeach Gonzalez's credibility to demonstrate that Ramiro Gonzalez was a murderer and the Court restricted counsel in this area. Attached to this Brief are indictments from the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, dated Fall Term 1975 (see Appendix/^NPage 1-6). Said Indictments charge Ramiro Gonzalez with two counts of first degree murder and other felonies.

POINT I

THAT THE TRIAL JUDGE ABUSED HIS
DISCRETION AND SEVERELY PREJUDICED
APPELLANT'S CASE WHEN TESTIMONY
OF OTHER ALLEGED SIMILAR CRIMES
WAS ERRONEOUSLY ADMITTED ON THE
PROSECUTION'S REBUTTAL

Ramiro Gonzalez, a convicted felon and a paid government informant, (2672, 2673, 2675) testified as a rebuttal witness on behalf of the prosecution. Gonzalez' testimony was admitted under the "similar crimes doctrine" (2543, 2549), over defense counsel's objections (2543, 2544, 2679). This evidence was admitted for the limited purpose of proving criminal intent (3245).

Gonzalez testified that he discussed selling heroin with AMADO LOPEZ in New York in April or May, 1970, but that no transaction allegedly occurred (2680, 2683). Gonzalez also testified to a conversation he allegedly had with Manuel Noa concerning AMADO LOPEZ around October, 1970. The substance of this alleged conversation was as follows: Manuel Noa owed Gonzalez \$15,000 from narcotics transactions. AMADO LOPEZ allegedly owed Noa \$12,500 from narcotics transactions (2684). Noa told Gonzalez to collect the money from Lopez (2686). Gonzalez testified

that he met AMADO LOPEZ in New York and Miami in the latter part of 1970 in an attempt to obtain \$12,500 (2687, 2703). It is respectfully noted that all of the above alleged conversations and meetings occurred subsequent in time to the duration of the conspiracy alleged in the indictment of Lopez under 74Cr48 and, defense counsel objected on this ground (2679).

It is respectfully submitted that extreme hostility and prejudice was fostered against defendant in the eyes and minds of the jurors by the aforementioned testimony, outweighing any possible probative value of the alleged evidence. Defendant argues that the trial judge abused his discretion in allowing this testimony before the jury, over defense counsel's objection.

In United States v. Bozza, 365 F 2d 206 (2nd Cir., 1966), the following test was enunciated for determining the admissibility of "other-crimes-evidence":

The problem is not merely one of pigeon-holing, but one of balancing, on the one side, the actual need for the other-crimes-evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused

was the actor, and the strength or weakness of the other-crimes-evidence in supporting the issue, and on the other the decree to which the jury will probably be roused by the evidence to overmastering hostility. Id., at 213,214, quoting from McCormick Evidence Section 157, at 332 (1954); see also United States v. Bradwell, 388 F 2d 619, 622 (2nd Cir., 1968), cert. den., 393 U.S. 843 (1968).

On the prosecution's main case, there was ample evidence from which "guilty intent" by the defendant could be inferred by a jury. Manuel Noa, the government's star witness, testified to alleged transactions involving contraband with the Appellant totaling approximately \$50,000. Appellant contends that this rebuttal testimony was "... thrown on scales already heavily tipped against the defendant..." and was unnecessary "to bolster" the prosecution's case. United States v. Bradwell, 388 F 2d 619, 622 (2nd Cir., 1968); cert. den., 393 U.S. 843 (1968). It has been held that with regard to the necessity of other crimes evidence, it is important to consider whether the defense... "'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake". United States v. Byrd, 352 F 2d 570, 575 (2nd

Cir., 1965) (conviction reversed due to trial judge's failure to adequately explain relevance of criminal intent to similar crimes evidence). In the case at bar, the defendant did not testify. It is respectfully submitted that none of the defense witnesses testified on the issue of intent, therefore, this issue was not "sharpened" to the extent necessary to admit evidence of other crimes. United States v. Fiererson, 419 F 2d 1020, 1023 (7th Cir., 1969) (conviction reversed due to improper admission of prior similar crimes).

Appellant argues that the "convincingness" of the alleged other crimes was non-existent. The evidence was given by Ramiro Gonzalez, a paid government informant, who was released from government custody after his testimony, a man with a long criminal record (2672, 2673, 2718, 2719). Gonzalez was serving a six year term in prison at the time of the trial below (2675, 2719).

It is further argued that the prejudice suffered by Appellant due to the admission of the "other crimes evidence" should not be underestimated. The jury was permitted to draw unwarranted inferences that the defendant had a propensity to commit the crimes charged in the indictment

United States v. DeCicco, 435 F 2d 478, 483 (2nd Cir., 1970) (conviction reversed due to improper admission of prior similar crimes).

It is respectfully submitted that the trial judge abused his discretion in allowing the aforementioned evidence before the jury:

Where the prejudice is substantial and the probative value through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage may be held to be an abuse of discretion. United States v. Byrd, supra, at 575.

Although the Byrd case concerned evidence of other crimes in the Government's case in chief, the same rationale applies to the rebuttal evidence in the case at bar, because the government never sufficiently substantiated its "necessity" and/or the "probative value" of said testimony.

In United States v. Baum, 482 F 2d 1325 (2nd Cir., 1973), a conviction was reversed because of improper use of prior crimes evidence. In that case, this Honorable Court placed particular emphasis on the fact that the witness who testified regarding the prior crime completely

surprised defendant.

Confronted for the first time with the accusation of prior criminal conduct and the identity of the accuser, the defendant had little or no opportunity to meet the impact of this attack in the midst of the trial. This precarious predicament was precipitated by the prosecutor. Id., at 1331.

The same "predicament" existed in the trial below. Defense counsel, by motion for bill of particulars, requested the names of all persons the government intended to use to prove its case. This was opposed by the government.

The name of Ramiro Gonzalez was not known until just prior to his testimony, and prevented defendant a "...fair opportunity to meet it." United States v. Baum, supra, at 1331. Defense counsel complained of the "surprise" (2667, 2761). See United States v. Persico, 425 F 2d 1375 (2nd Cir., 1970).

It is noted that Gonzalez was in custody under government supervision, and afforded government protection.

Defense witnesses Rivero and Diaz had returned to Florida after their testimony and could not be recalled

after their departure. To allow the government to take unfair advantage and surprise the defendant in this manner clearly requires that Appellant be granted a new trial.

Appellant argues that the testimony of Gonzalez was of alleged acts subsequent in time to that of the Indictment and that there is no valid authority for the admissibility of such evidence.

POINT II

THAT THE TRIAL JUDGE ABUSED
HIS DISCRETION, & CONSIDERED IM-
PERMISSIBLE FACTORS IN SENTENC-
ING THE APPELLANT LOPEZ TO A TERM
OF FIFTEEN YEARS IN PRISON

On January 9, 1976, the Honorable Jacob Mishler sentenced AMADO LOPEZ for a term of fifteen (15) years in prison. (see minutes of sentencing hearing, attached hereto as Appendix J , page 13). It is respectfully submitted that the trial judge unfairly considered the fact that Lopez had escaped from prison (a crime for which Lopez pled guilty to, and was sentenced to two years in prison to run consecutively with the sentence herein), when he determined what sentence to give to appellant, case note, 3 Hofstra Law Review 867, 868 (summer 1975). The following statement from the court is illustrative:

"Why should I assume that this defendant was leading a perfectly normal conventional and lawful existence after his escape? (App. J P. 8)."

Furthermore, the trial judge accused the defendant of suborning perjury, and referred to a defense witness' (referring to Ms. Aurora Garcia) testimony as "phony" during defendant's sentencing hearing:

"THE COURT: I heard him in effect

put some witness on, I heard a woman get on the stand and say, no, this really isn't the fellow who was involved. He looks like his brother and he sat there and heard that, and I must assume that he manipulated that perjury testimony.

MR. SHAW: I don't think he could manipulate anything.

THE COURT: That was as phony as a three dollar bill that testimony of that woman who was Mr. Lopez' sister or some relations to him.

MR. SHAW: She wasn't his wife or anything else. There were three witnesses, two men that came up that worked in the store of the family and then this woman. And the man was in jail at all times and was not visited by the woman. I have the records of --

THE COURT: I don't expect you to characterize that testimony, but I will. That was a blatant liar as I have ever heard from a witness stand.

MR. SHAW: Well, Judge, I kept telling you that there was a brother of Amado that had a name --

THE COURT: The name of all his brothers begin with the letter A. His father just didn't get off the first letter of the alphabet. Amado, Albert, and Analdo.

MR. SHAW: It was an interesting case

because we had a family --

THE COURT: Mr. Shaw, I am talking about that testimony, and you tell me something, is it coincidence that the brother that he said he looked like was probably involved in the narcotics?

MR. SHAW: Accordingly he was convicted and spent four months in jail for one of the brothers.

THE COURT: Was that just a coincidence that she said he looked like this particular defendant? That he was a duplicate. That you couldn't tell them apart?

MR. SHAW: Well, some people are confused between brothers.

THE COURT: Sure, if you want to be sometimes without even trying. But if you try very hard to be confused, you can be.

Do you have a picture of the brother?

MR. DEPETRIS: There was no picture at the trial, Your Honor. I had asked for one, but there was not one.

MR. SHAW: I don't have a photograph, Judge. There is a family resemblance. I didn't recognize my client with his hair all cut.

THE COURT: You didn't recognize your client?

MR. SHAW: No, when I walked in the

room, and then I realized it was him.

THE COURT: What does that prove?

MR. SHAW: Nothing.

THE COURT: The woman could have told the truth on the stand. I didn't ask her to lie. I didn't put the question to her. Somebody asked her to lie. She sat there and knew that it was a lie.

MR. SHAW: I don't know exactly, Judge --

THE COURT: I am not saying that you asked her to, Mr. Shaw. But when you tell me about how rational and truthful this man is, I say that is a misrepresentation. I think he is closer to the other side. (App. P. - 12)."

It is respectfully noted that Lopez received a sentence that was more than two times longer than any of the sentences given to the other defendants who were convicted in the trial below. It is further noted that the prosecution also had difficulty with the identification of AMADO LOPEZ. (see Appendix/^KPage 4. minutes of Southern District sentence.).

In United States v. Weston, 448 F 2d 626 (9th Cir., 1971); cert. den., 404 U.S. 1061 (1971), a sentence was vacated because the trial judge improperly considered

inaccurate information to arrive at his decision on a sentence. The case at bar is clearly analogous. The trial judge considered his own allegation of perjured testimony and the fact that Lopez had escaped from prison and pled guilty to that charge in the Southern District when the extremely harsh, fifteen year sentence was imposed, even though the sentence on the escape charge was not in his province to rule upon, and the defendant was to be sentenced by Judge Werker in the Southern District for that crime.

"There is a difference between reviewing a sentence and deciding that certain types of information should not, for various reasons, be considered in sentencing. In the ~~later~~ type case, the Appellate Courts have not undertaken to modify the sentence. Instead, they have vacated the sentence and remanded for resentencing, instructing the trial court to disregard the objectionable information. Id., at 631.

It is respectfully requested that this Honorable Court vacate the sentence imposed on AMADO LOPEZ, and remand the case for re-sentencing to Honorable Judge Mishler.

POINT III

THE GUILTY PLEA OF A CO-
DEFENDANT, DOMINGO COCA, A
GOVERNMENT INFORMANT, DURING
THE TRIAL, AFTER SAID CO-
DEFENDANT AND HIS COUNSEL PLAYED
AN ACTIVE ROLE IN THE DEFENSE OF
THE CONSPIRACY AT TRIAL, UNFAIRLY
PREJUDICED APPELLANT, LOPEZ

Domingo Coca, a co-defendant and a paid government informant entered a plea of guilty in satisfaction of the charges in the indictment, in the midst of cross-examination of the prosecution's star witness, Manuel Noa (1461). Counsel for Appellant-Defendant Lopez prior to the entry of the plea by Coca, argued the potential prejudicial impact on the jury when a co-defendant and his attorney "disappear" in the middle of a trial (1390, 1391). In spite of the trial judge's instructions (1471), it is respectfully submitted that the plea of Domingo Coca, a government informant (1454, 1455), in the midst of the trial, unfairly prejudiced AMADO LOPEZ in the eyes of the jury.

Defendant is aware that, standing alone, the aforementioned guilty plea would not constitute reversible error. United States v. Aronson, 319 F 2d 48, 52 (2nd Cir., 1963) cert. den., 375 U.S. 920 (1963) Appellant argues that said

plea impropreity coupled with the Government's extreme pre-indictment delay and misuse of rebuttal testimony created prejudice in the eyes of the jury in regard to Appellant Lopez. Appellant notes that the only testimony directly connecting Lopez to the charges in the indictment came from Manuel Noa, a convicted, major distributor of heroin and cocaine, and that the other twomajor witnesses CORONEL and ARENAS did not testify against Appellant Lopez.

....we cannot ignore the totality of this and other improprieties when examining whether in this particular case, where the factual issues were close and the Government's case was not particularly strong, the defendant received an impartial trial. United States v. Grunberger, 431, F 2d 1062, 1069 (2nd Cir., 1970) (conviction reversed due to accumulation of errors).

Appellant complains that Coca (the defendant who pleaded guilty) and his counsel sat at defense counsel's table for over a week and that Coca and his counsel actively took part in defense strategy with co-defendants and co-counsel during pre-trial and at the trial. Said active participation coupled with the guilty plea of the

co-defendant Coca and withdrawal of his counsel exacerbated the prejudice against the appellant in the eyes and minds of the jury.

POINT IV

THAT THERE IS A CLOSE PHYSICAL
RESEMBLANCE BETWEEN AMADO LOPEZ
AND HIS BROTHER ARMANDO LOPEZ,
THAT BOTH THE BROTHERS LOPEZ
HAVE BEEN INDICTED FOR FEDERAL
NARCOTICS VIOLATIONS THAT AN
IDENTIFICATION HEARING, UNDER
THE CIRCUMSTANCES, SHOULD BE HELD
TO DETERMINE WHETHER AN INNOCENT
MAN HAS BEEN CONVICTED AND
IMPRISONED

Ms. Aurora Garcia identified Appellant AMADO LOPEZ at the defendant's table at trial (2918). She testified that the defendant had a brother named Armando who strongly resembled him (2919). This resemblance consisted of similar hair color, height and mustache (2919, 2920).

On information and belief there is an Indictment in the Eastern District of New York charging Armando Lopez the brother of the Appellant with violations of federal narcotics statutes. Upon information and belief, Armando Lopez is now a fugitive from justice.

AMADO LOPEZ was sentenced on another charge in United States v. Perna, 74 Cr. 1018 (S.D.N.Y., January 19, 1976). At that sentencing hearing, the following colloquy

in regard to the identity of the Appellant, occurred at
K
pages 38 and 29 (see Appendix/Page 4).

"MR. FLANNERY (Assistant United States Attorney): Your Honor, could I just ask one question?

The defendant looks somewhat different than previously, and I know that there is a twin, or a resembling brother over there, and I would just like to have him state for the record that he is the Lopez named in the indictment.

MR. SHAW: I would indicate to the U.S. Attorney that I indicated earlier to the Court when I saw Mr. Lopez earlier before in the Eastern District I was taken aback, but I sincerely believe this is the man I represented in the Eastern District in 1974 and the same man who was a co-defendant with my client, Mr. Garcia, and I don't think there is anything wrong in your saying what your name is to the Courts.

Defendant Lopez: My name is AMADO LOPEZ.

THE COURT: And you are the person who is named in this indictment?

DEFENDANT LOPEZ: Yes.

MR. FLANNERY: Thank you, your Honor.

MR. SHAW: I would indicate, your Honor, that there was a question in the Eastern District case before Judge Mishler between an Amado and Amando, and in fact

when I sent to see this man the first time along with Mr. Brown in the new Federal Correction Center he was listed incorrectly as Amando.

THE COURT: All right."

It is respectfully submitted that the above colloquy indicates that even the Government has doubts concerning the identity of the two brothers, the Appellant AMADO LOPEZ and Armando Lopez. It is further submitted that the Government witnesses who expected leniency in return for their cooperation would not hesitate to "blind" themselves and falsely identify Lopez in order to "save their own necks," and that their "identification" of the Appellant was erroneous. The testimony of the Government did not concern more than resemblance and was therefore insufficient to convict, Alexander v. U.S., 354 F 2d 59, 63 (5th Cir., 1965).

It is respectfully requested that a post-trial identification hearing is necessary to prevent the possible imprisonment of an innocent man.

POINT V

THE PRE-INDICTMENT DELAY OF FOUR YEARS FROM THE TIME OF THE ALLEGED CRIMINAL ACTS TO TRIAL RESULTED IN SEVERE PREJUDICE TO AMADO LOPEZ. DEPRIVING HIM OF HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

AMADO LOPEZ attempted to prove that he was working in a restaurant in Miami, Florida during the time of the alleged conspiracy. Isaac Rivero and Rigoburto Diaz, co-workers in the restaurant, testified that AMADO LOPEZ worked in the restaurant in 1968 and 1969. However, it was impossible for these witnesses to recall with exactitude particular time periods when AMADO LOPEZ worked in the restaurant because of the length of time that elapsed between the times of the alleged overt acts and the time of trial.

The sealed indictment of Defendants-Appellant, AMADO LOPEZ for conspiracy was opened on February 20, 1974^C (Appendix/Page 1). The alleged conspiracy occurred between January 1, 1968 and December 31, 1970 (supra). This preindictment delay of over four years resulted in Defendants-Appellants being hindered in preparing their

defense. For instance: alibi witnesses were not able to be called because their memories of the Defendants-Appellants in regard to their whereabouts at crucial times during the course of the alleged conspiracy were severely impaired.

The memories of prosecution witnesses suffered also. A key prosecution witness, Coronel, an informant, admitted directing this conspiracy, but stated his memory was severely impaired.

This prejudice, caused by the extreme pre-indictment delay of four years, deprived Defendants-Appellants of their rights under the due process clause of the Fifth Amendment.

It is well-settled that pre-indictment delay can amount to a denial of due process if sufficient prejudice is shown. United States v. Marion, 404 U.S. 307, 323-324 (1971); United States v. Feinberg, 383 F.2d 60, 65 (2nd Cir. 1967); cert. denied, 389 U.S. 1044 (1968); Ross v. United States, 349 F.2d 210, 215-216 (D.C. Cir., 1967).

There is no presumption of prejudice that attaches to a lengthy pre-indictment delay. United States v. Parrot, 425 F.2d 972, 976 (2nd Cir., 1970), cert. denied, 400 U.S. 824 (1971); United States v. Feinberg, *supra*.

Defendants-Appellants argue, however, that:

Pre-arrest delay may impair the capacity of the accused to prepare his defense, and, if so, such impairment may raise a due process claim under the Fifth Amendment. United States v. Feinberg, supra, at 65.

The Supreme Court has ruled that the circumstances of each case must be analyzed to determine whether the requisite degree of prejudice has been shown. United States v. Marion, supra, at 325; United States v. Ianelli, 461 F.2d, 483, 485 (2nd Cir., 1972); cert. denied, 409 U.S. 980 (1972).

It is respectfully submitted that the total inability to establish a viable defense for AMADO LOPEZ was caused by the aforementioned pre-indictment delay, and caused such prejudice as to require a reversal of the conviction.

POINT VI

THE TRIAL JUDGE ERRONEOUSLY
DENIED DEFENDANT'S MOTION TO
DISMISS THE INDICTMENT ON THE
GROUND OF DOUBLE JEOPARDY

In the case of United States v. Amado Lopez and Thomas Llerna, in the District Court for the Southern District of Florida, Index No. 710450 Cr. P.F., Defendant Amado Lopez was convicted of conspiracy to distribute Schedule I and Schedule II narcotic drugs. Kilogram quantities of said drugs were involved in that conspiracy.

In the aforementioned prosecution in Florida, after defendant had presented his case, the United States Attorney called a rebuttal witness, one Carlos Banos Lazo. Said rebuttal witness testified about a meeting to violate the Federal Narcotics Laws in Miami with the defendant, AMADO LOPEZ, in October or November, 1970, as follows:

"Q: What was the purpose of the meeting?

MR. KREUTZER (defense counsel): Just a moment. Objection.

THE COURT: Overruled.

MR. KREUTZER: It is not within the period alleged nor in the period questioned.

BY MR. KEEFE, ASSISTANT UNITED STATES ATTORNEY

Q: What was the purpose of that meeting?

A: It was the purpose of the meeting to obtain one kilogram of cocaine from Mr. Amado Lopez.

Q: Did you happen to see the cocaine on that occasion?

MR. KREUTZER: Objection. He has not been qualified to give an opinion as to what a substance might have been.

THE COURT: Overruled.

THE WITNESS: On that occasion Amado Lopez brought some cocaine out, but the kilo was brought up that afternoon around seven o'clock.

Q: But you saw it in his presence at that time?

A: Yes.

Q: No further questions."

It is respectfully submitted that the United States Attorney extended the dates of the conspiracy charged in the Indictment by eliciting the above testimony from Mr. Lazo, a Government paid informant. The effect of this testimony on the minds of the jury cannot be minimized. However, in terms of double jeopardy, the legal relevance of Mr. Lazo's testimony did not arise until defendant, Amado Lopez was indicted for conspiracy to violate the Federal

Narcotics Laws under title the United States Code, in the Eastern District of New York, Indictment No. 74-Cr.-48, other defendants.

In the case in the Eastern District, the United States Attorney used tactics identical to those used in the Florida prosecution. After defendant presented his case the Government called Ramiro Gonzalez on rebuttal.

Gonzalez was a government paid informant, who testified about meetings he had with defendant to violate the Federal Narcotics Law in New York and Miami in late October and/or early November 1970. The following testimony from the Eastern District trial is pertinent:

"Q After you had this conversation with MR. NOA did there come a time when you met with Mr. Lopez?

A Yes.

Q Where was that?

A That was at the Paramount Hotel on Eighth Avenue and 46th Street here in New York.

Q Do you recall when that meeting took place, approximately?

A In the last part of October or the beginning of November of 1970.

Q Would you relate to the jury the substance of that conversation that you had with Amado

Lopez at that time?

MR. SHAW: I would like to voice an objection at this point.

THE COURT: On what ground?

MR. SHAW: Again, your Honor, 1970.

THE COURT: Objection overruled.

A I went to visit a friend of mine there, Luis Reyos, and when I got to his room, Mr. Amado Lopez was there and I told him what was going on and he said yes, he was willing to pay me the money but that I would have to wait for him to go back to Maimi. A few days later I went back to Miami and we had two, three conversations, and then he told me that all his money-- (T-2686, 2687).

BY MR. DEPETRIS (cont'd)

Q Mr. Gonzalez, after you met with Mr. Lopez in New York, did you see him again in Miami a few days later?

A Yes.

Q And did you meet with him to attempt to obtain the 12,500?

MR. HIRSHMAN: Objection, leading.

THE COURT: Overruled, I will allow it.

A Yes.

Q When you met with him during that conversation, did Mr. Lopez tell you that he had all his money tied and he couldn't pay you then?

A Yes.

Q Where did you go after you had that meeting with Mr. Lopez?

A During those days we had two or ~~three~~ conversations." (T-2703, 2704).

It is respectfully noted that the meetings to which Ramiro Gonzalez referred involved cocaine in October or November 1970. The following colloquy between the Court, the United States Attorney, and defense counsel makes this abundantly clear:

"May we have a side bar for a moment, your Honor?

THE COURT: The jury is excused.

(Jury leaves courtroom).

MR. DE PETRIS: It's not anything that has been translated, your Honor. I thought I heard the word "cocaina", concerning the reason why Mr. Lopez couldn't pay him the 12,500 and I had not discussed that with your Honor.

It slipped my mind when I was making the offer of proof. I didn't want the cocaine to be translated until we had a conversation.

THE COURT: Let me hear the whole answer.

MR. SHAW: One of the jurors speaks Spanish.

THE COURT: Continue.

A Was tied up -- all his money was in a cocaine deal and that day or the following day he was about to receive about 30 kilos of cocaine is what he told me and he offered to give me three kilos and I had asked somebody else that he could deliver it to and at that point I left the country and I don't know what happened." (T-2688).

It is respectfully submitted that the rebuttal testimony of Ramiro Gonzalez carried strong weight in the minds of the jury when they convicted defendant Amado Lopez in the Eastern District of New York. It is further respectfully submitted that the rebuttal testimony of Carlos Banos Lazo carried equally strong weight in the minds of the jury in the conspiracy trial in the Southern District of Florida. Defendant contends that the same transactions were used to convict him in two separate trials under two separate indictments, that were, in effect, acts done in the furtherance of one conspiracy.

The two Lopez indictments charge different overt acts, however this Circuit has stated that "a test

measuring only overt acts provides no protection against carving one larger conspiracy into smaller separate agreements". United States v. Mallah, 503 F 2d 971, 985 (2nd Cir., 1974). The testimony of the rebuttal witnesses indicates that the government had to rely on the same or similar transactions in the same location at the same time to convict Amado Lopez.

The indictment in the Eastern District of New York involved the foot soldiers of a large scale narcotics ring. The Indictment in the Southern District of Florida charged a conspiracy involving the same foot soldier, ~~allegedly~~ Amado Lopez. Although there are literal differences between the armed co-conspirators, the overt acts alleged, and the time frames of the two conspiracies, these differences are not necessarily controlling, United States v. Mallah, supra, at 986.

The Government ~~did~~ not attempt to define the geographical scope of the conspiracy. Furthermore, it is not clear whether there is any difference between the two conspiracies with respect to such key factors as the principals, the source of their drugs, the means and places of importation, and their distribution points. United

States v. Mallah, supra.

There are striking similarities that cannot be overlooked by this Court in considering the issue of double jeopardy in regard to defendant, Lopez. Both the Eastern District of New York indictment of Lopez and the indictment in the Southern District of Florida of Lopez were for violations of the Federal Narcotics Law for Schedule I and Schedule II Narcotics. Both cases were tried in Federal Courts for conspiracy to violate said Narcotics Laws. Both indictments involve Spanish-speaking individuals and Cuban expatriates. The alleged two conspiracies occurred in the same location at the same general time (see Mallah at 985). Both indictments involve kilogram quantities and sales in the Miami area. See United States v. Mallah, supra, at 985.

In both Lopez prosecutions the government relied on testimony of government paid spanish speaking informants. In both Lopez prosecutions the government relied on rebuttal evidence, to seek a conviction of Lopez. In both cases the government rebuttal testimony involved sale of Schedule I and II narcotics in the Miami area in late October or early November 1970. The testimony

of the government paid witnesses did not state that the continuing enterprise to violate the Federal Narcotics Law came to a halt in 1970.

The defendant contends that any "...evidence of distinctness to which the government points is not considerable" United States v. Mallah, supra, at 986. The government knew full well that "...separate indictments on substantive counts are always available, without double jeopardy problems", United States v. Mallah, supra, at 987.

In spite of all the aforementioned similarities between the indictments and crimes alleged in the Southern District of Florida trial and the Eastern District of New York trial, the Trial Judge below, the Hon. Jacob Mishler denied defendant's motion to dismiss on the ground of double jeopardy in a Memorandum of Decision and Order, dated December 1, 1975 (see Appendix, I Pg. 3). It is respectfully submitted that the decision of the trial judge was erroneous and should be reversed by this Honorable Court.

CONCLUSION

For all the aforementioned reasons, a new trial should be granted, or, in the alternative, the case should be remanded for re-sentencing and/or an identification hearing.

Dated: New York, New York
May 13th , 1976.

Respectfully submitted,

STUART R. SHAW
Attorney for Appellant
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600 Madison Avenue
New York, New York 10022
(212) 755-5645

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

- against -

AMADO LOPEZ,

Appellant.

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ON APPEAL

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MISHLER, J.

TITLE OF CASE		ATTORNEYS		
THE UNITED STATES		for deft: Amado Lopez		
vs.		Stuart Shaw		
X MARIO BUENO X JOSE MENDEZ aka "Pope"		233 Broadway, NYC. 10007		
X TEODORO CACERES aka "Teo" RAUL ORTEGA		Suite 3303		
LUIS CALABRESE aka "Luisito"		CASTELLANO- Nicolas Noguera		
X DOMINGO COCA VICENTE ORTIZ aka "Cusi"		N.Y. Hilton, room 639 N.Y.		
X RAUL CASTELLANO DINO ROMANO aka "Luis B"				
X GILBERTO FERNANDEZ aka "Toy Toy"				
RAUL FERNANDEZ JOHN DOE aka "Chino Gha"				
X JOHN DOE aka "Fillo"				
ROGELIO FERNANDEZ				
conspire ROBERTO DIAZ JIMINEZ aka "El Gaujiro"				
ort heroin AMADO LOPEZ				
JOSE MASEO				
ABSTRACT OF COSTS		CASH RECEIPTS		
AMOUNT	DATE	NAME	RECEIVED	DISBURSED
Fine,	11/22/74	11/22/74 Notice of appeal		
Clerk,		(CASTELLANO) (NO FEE)		
M al,		11-26-74 Notice of Appeal		
Attorney,		(GILBERTO FERNANDEZ) no fee.		
Commissioner's Court,				
Witnesses,				
PROCEEDINGS				
DATE	PROCEEDINGS			
1-23-74	Before JUDD, J - Indictment filed ordered sealed by the Court - Bench Warrants Ordered for all defts.			
2-5-74	Bench warrants issued for all defts			
2-22-74	By MISHLER, CH J - Order filed that the above indictment be opened by the Clerk of the Court for the limited purposes of reproducing as many copies of the indictment as are necessary for extradition proceedings and further Ordered that after the above reproduction is completed the indictment be resealed, etc.			
2-27-74	Bench warrant, copy of indictment, Affidavit of Bernard Fried, Affidavit filed and sealed			
3-12-74	Before MISHLER, CH J - case called - defts BUENO & GILBERTO FERNANDEZ produced in court on a Bench Warrant - Interpreter			
	Monagaita Mance present - Indictment ordered unsealed - defts.			

DATE	PROCEEDINGS								
1-23-74	Before JUDD, J - Indictment filed ordered sealed by the Court - Bench Warrants Ordered for all defts.								
2-5-74	Bench warrants issued for all defts								
2-22-74	By MISHLER, CH J - Order filed that the above indictment be opened by the Clerk of the Court for the limited purposes of reproducing as many copies of the indictment as are necessary for extradition proceedings and further Ordered that after the above reproduction is completed the indictment be resealed, etc.								
2-27-74	Bench warrant, copy of indictment, Affidavit of Bernard Fried, Affidavit filed and sealed								
3-12-74	Before MISHLER, CH J - case called - defts BUENO & GILBERTO FERNANDEZ produced in court on a Bench Warrant - Interpreter Margarita Mensa present - Indictment ordered unsealed - defts.								

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DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
	arraigned - court advised both defts of their rights and each enters a plea of not guilty on their behalf. debt GILBERTO FERNANDEZ bail set at \$150,000 surety bond - court appointed counsel for debt BUENO and bail set at \$10,000 surety company bond.		
3-12-74	Bench Warrants ret'd and filed - Executed as to defts. MARIO BUENO and GILBERTO FERNANDEZ. Bench Warrant ret'd and filed unexecuted as to debt VICENTE ORTIZ. (reported out of country)		
3-13-74	Before MISHLER, CH J - case called - debt BUENO present without counsel - Interpreter Margarita Mensa present - on motion of AUSA Fried bail is modified to \$10,000 P/R Bond.		
3-14-74	By MISHLER, CH J - Order apptg counsel filed for debt MARIO BUENO.		
3-18-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Lopez)		
3-18-74	By MISHLER, CH J - Writ Issued, (Amado LOPEZ)		
3-19-74	Notice of Appearance filed (FERNANDEZ)		
3-19-74	Affidavit of BERNARD J. FRIED filed (re Vincente Ortiz)		
3-19-74	xxxxxx Affidavit of BERNARD J. FRIED filed (re Vincente Ortiz) xxxxxxxx		
3-19-74	Before MISHLER, CH J - Case called - debt FILLO aka John Doe present without counsel - Interpreter Libya Clancy present - debt arraigned and the Court enters a plea of not guilty on defts behalf - court to appoint counsel - Bail set at \$10,000 P/R Bond.		
3-20-74	Before MISHLER, CH J - Case called - motion by debt Gilberto Fernandez for reduction of bail argued - bail modified to \$2,500 cash deposit and wife of debt to sign a surety bond for \$150,000 upon proof that the Mortgage and Liens on defts home are not in excess of \$18,000.		
3-20-74	By CATOCCIO, MAG. - Order for acceptance of cash bail filed (GILBERTO FERNANDEZ)		
3-20-74	By MISHLER, CH. J. - Order appointing counsel filed (JUAN PEREZ o/k/a FILLO)		
3-21-74	Before MISHLER, CH. J. - Case called - Debt Ortega and counsel present - Libya Clancy present as interpreter - Debt arraigned and enters a plea of not guilty and not guilty by reason of double jeopardy and collateral estoppel - Bail at \$50,000 P/R bond with wife to sign as surety and also the bail conditions that were set in the Southern District of New York		
3-21-74	Bench warrant ret'd and filed - executed		
3-21-74	Notice of appearance filed - (RAUL ORTEGA)		
3-26-74	Before MISHLER, CH J - case called - debt MENDEZ & counsel Sidney Solt		

CRIMINAL DOCKET

DATE	PROCEEDINGS
3-26-74	Notice of Appearance filed (Jose Mendez) that the undersigned (I. Edward Pogoda, Esq., 50 Court St., Bklyn, NY. TR 5-6624-5 has been retained by the deft for the purpose of accepting service of all process in the within action on behalf of Sidney Soltz, Esq. 19 W. Flagler St. Miami, Fla.
3-26-74	Before MISHLER CH. J. - Case called- Deft and counsel present- Interpreter Gerardo Sanchez present- Deft arraigned and enters a plea of not guilty (AMADO LOPEZ)
3-26-74	Notice of appearance filed (AMADO LOPEZ)
3-26-74	Three orders of removal, cash bond, and magistrates proceedings consisting of 3 appearance bonds received from Southern District of Florida and filed- (appearance bonds placed in vault)- Acknowledgment mailed for receipt of above documents (CACERES, MENDEZ AND COCA)
3-27-74	Writ ret'd and filed- executed (LOPEZ)
3-28-74	Magistrate's file 74 M 395 inserted into CR file.
3-28-74	Magistrate's file 74 M 420 inserted into CR file.
4-1-74	Before Mishler, Ch J - case called - deft COCA & counsel Martin Light present- deft arraigned and enters a plea of not guilty - Bail fixed at \$50,000 P.R. Bond with wife to sign as surety and the house of deft to be security - april 19, 1974 for trial.
4-1-74	Notice of Appearance filed (DOMINGO COCA)
4-5-74	Before MISHLER, CH. J. - Case called- Deft CACERES and counsel present- Interpreter Libya Clancy present- Deft arraigned and enters a plea of not guilty- Bail set at \$50,000 P/R Bond- with wife to sign as surety secured by property of the deft (CACERES)
4-5-74	Notice of appearance filed (CACERES)
4-5-74	By MISHLER, CH. J. - Order appointing counsel filed (substitution of counsel for deft BUENO)
4-10-74	By Mishler, ch J - Order apptg counsel filed (Bueno) Stanley Hausen in place of Stuart Shaw, Esq.) and letter from Stuart Shaw, Esq. dated April 3, 1974 re deft Bueno for withdrawal etc.
4-19-74	Appearance Bond filed (Coca) received from U.S. Magistrate, Southern District of Fla. (placed in vault # 61317)
4-19-74	Letter from Albert Carricarte, esq. to chambers filed- letter dated 4-15-74 (RE:- Teodoro Caceres)
4-19-74	Before MISHLER, CH J - case called - Pre Trial Conference held and concluded - August 5, 1974 for trial.

DATE	PROCEEDINGS
	(See order on back of motion papers) So Ordered
7-30-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Mendez)
7-30-74	By Mishler, Ch J - Writ Issued, ret 8-5-74 (Mendez)
7-31-74	Notice of Motion to dismiss for deft GILBERTO FERNANDEZ filed - ret 8-5-74
8-2-74	Letter to chambers from Stuart Shaw, esq. dated 8-1-74 filed re: deft Amado Lopez
8-2-74	Affirmation of Stuart Shaw, esq. filed
8-2-74	By MISHLER, CH. J. - Order of 8-2-74 and affidavit sealed by court
8-5-74	Before MISHLER, CH J - case called - defts CAGERES, COCO, CASTELLANO G. FERNANDEZ & LOPEZ present with counsels - defts MENDEZ not present - counsel present - case reset for trial on 8-19-74.
8-5-74	Before MISHLER, CH J - case called - motion to dismiss indictment denial of due process to be argued at the end of the trial (GILBERTO FERNANDEZ)
8-6-74	74 M 808 inserted in criminal foled (Raul Castellano)
8-12-74	Transcript of Removal Hearing filed received from U.S. District Court, San Juan, Puerto Rico (re deft Raul Castellano)
14-74	Deft Gilberto Fernandez requests that following questions be included in the Voir Dire: (see paper as indicated) forwarded to Chambers. (submitted by Alan Hirshman, counsel for the deft)
8-19-74	Before MISHLER, CH J - Case called - defts & counsels present - Interpreters Emil Rodriguez, Joaquim Guma & Maria Elena Cardenas sworn as interpreters - Defts application for 2 copies of trial transcript under CIA - Granted - Order to be submitted - Trial ordered and BEGUN - Jurors selected and sworn - Trial contd to 8-20-74
8-20-74	Before MISHLER, CH J - case called - defts & counsels present - Trial resumed - Govts motion to reinstate Libya Clancy as interpreter - Granted - Defts Lopez's motion for production of Coronel's passport - denied - Defts motion to unseal the indictments in which the witness Coronel is named - denied - Trial contd to 8-21-74. Deft Lopez's and Fernandez's motion for discovery granted.
8-21-74	Before Mishler, Ch J - case called - defts & counsels present - trial resumed - deft Lopez's motion for mistrial denied - Trial contd to 8-22-74.
	(over)

DATE	PROCEEDINGS
8-22-74	Before Mishler, Ch J - Case called - hearing begun - trial resumed - Trial contd to 8-26-74 at 10:00 am.
8-26-74	Before Mishler, Ch J - case called - trial resumed - trial continued 8-27-74 at 10:00 am.
8-27-74	: Before MISHLER, CH J - case called - trial resumed - Deft Lopez's motion for severance - denied - Trial continued to 8-28-74.
8-27-74	Material ordered sealed by the Court and placed in vault.
8-28-74	Before MISHLER, CH J - case called - trial resumed - Deft Domingo Coca enters a plea of guilty to Superseding Information 74 CR-537 - Waiver of Indictment signed and witnessed - bail contd - trial continued to 8-29-74. Deft Lopez' motion for severance and defts Fernandez's motion for severance denied.
8-29-74	Petition for Writ of Habeas Corpus Ad Testificandum filed.
8-29-74	By MISHLER, CH J - Writ Issued, ret. 9-3-74.
8-30-74	Before MISHLER, CH.J. - Case called- Defts and counsel present- Trial resumed Trial contd to 8-30-74
8-30-74	Before MISHLER, CH.J. - Case called- Defts and counsel present- Trial resumed Trial contd to 9-3-74
9-3-74	By MISHLER, CH.J. - Order filed and sealed by the court
9-3-74	Before MISHLER, CH.J. - Case called- Defts CACERES, CASTELLANO, FERNANDEZ LOPEZ and MENDEZ present with counsel- Interpreter present- Trial resumed Trial contd to 9-4-74 at 10:00 A.M.
9-4-74	Before MISHLER, CH.J. - Case called- Defts CACERES, CASTELLANO, FERNANDEZ LOPEZ and MENDEZ present with counsel- Interpreters present- Trial resumed Motion by defts MENDEZ and CACERES for a mistrial is denied- Govt rests Motion by all defts for a directed verdict and to dismiss the indictment denied- Trial contd to 9-9-74 at 10:00 A.M.
9-6-74	Writ retd and filed- executed
9-9-74	Before Mishler, Ch J - case called - defts CACERES, CASTELLANO, FERNANDO LOPEZ & MENDEZ present with counsels - Interpreter Emil Rodriguez and Daisy Santos present - trial resumed - Trial continued to 9-10-74.
9-10-74	Before Mishler, Ch J - case called - defts CACERES, CASTELLANO, FERNANDO LOPEZ & MENDEZ present with counsels - Interpreter Emil Rodriguez and Daisy Santos present - Trial resumed - Trial contd to 9-11-74.
9-10-74	By Mishler, Ch J - Order of sustenance filed (Lunch 16 persons)
9-11-74	By Mishler, Ch J - Order of sustenance filed (Lunch 16 persons)

CRIMINAL DOCKET

DATE	PROCEEDINGS
	Motion by deft Caceres for a mistrial is denied - Trial contd to 9-12-74.
9-12-74	Before MISHLER, CH.J.- Case called- Defts and counsel present- Interpreter present-Trial resumed-Govt rests- All defts rest- Motion by all deft for a judgment of acquittal argued- motion denied- Trial contd to 9-14-74 at 10:00 A.M.
9-13-74	By MISHLER, CH.J.- Order of sustenance filed
9-14-74	Before MISHLER, CH.J.- Case called- Deft and counsel present- Interpreter present- Trial resumed- Trial contd to 9-16-74 at 10:00 A.M.
9-16-74	Voucher for XXXXXXXXXXXX expert services filed(CASTELLANOS)
9-17-74	By MISHLER, CH.J.- Order of sustenance filed
9-18-74	Before MISHLER, CH.J.- Case called- Defts Caceres, Castellano Fernandez, Lopez and Mendez present with counsel-Interpreter E. Rodriguez and J. Guma present-Trial resumes-At 12:15 P.M. the jury ret'd retired for deliberation-At 9:30 P.M. the jury ret'd and asked to continue their deliberation on 9/18/74 at 10:00 A.M.-Trial cont'd 9/18/74
9-17-74	2 Orders of Sustenance filed.
9-18-74	Voucher for Expert Services filed.
9-18-74	Letter of Stuart Shaw to Ch.J. Mishler filed
9-18-74	Before MISHLER, CH.J.- Case called- Deft Caceres, Castellano, Fernandez, Lopez and Mendez present with counsel-Interpreter E. Rodriguez and J. Guma present-Trial resumed-At 3:15 P.M. the jury ret'd and rendered a verdict of guilty as to defts Castellano, Fernandez and Lopez as charged-Defts Caceres and Mendez were found not guilty and were discharged by the court-Sentence adj'd without date Jury polled-Jury discharged-Trial concluded-Bail set at \$50,000.00 Surety Co. Bond set to deft Castellano-Bail set at \$50,000.00 with home of deft as security and \$2,500.00 cash deposit as to deft Fernandez)All motions reserved to time of sentencing-Court ordered the memorandum of verdict signed by the foreman filed.
9-18-74	Memorandum of Verdict signed by the foreman filed.
9-18-74	By MISHLER, CH.J.- Order of Sustenance dated Sept. 18, 1974 filed.
9-18-74	By MISHLER, CH J - Judgment of Acquittal filed (defts.CACERES & MENDEZ)
9-19-74	Writ ret'd and filed- exeucted (MENDEZ)
9-23-74	Voucher for expert services filed(CASTELLANO and LOPEZ)(Interpreter)

DATE	PROCEEDINGS
9-24-74	Two vouchers for expert services filed
9-24-74	Stenographers Transcripts dated 9-16-74 and 9-18-74 filed
10-16-74	Letter filed dated 10-15-74 from Stuart R. Shaw Esq. received from Chambers.
11-1-74	Before MISHLER, CH J - case called - defts JOHN DOE AKA Fillo, BUENO, & COCOA present with counsels - On motion of AUSA David De Petris the Indictment is dismissed as to defts JOHN DOE aka Fillo, Bueno and Coca.
11-1-74	By MISHLER, CH J - Order of dismissal filed as to above defts.
11/7/74	Stenographer's transcripts 9/9/74, 9/10/74, 9/11/74, 9/12/74, 9/14/74 filed.
11/8/74	Stenographers Transcript dated 8/19/74, 8/20/74, 8/21/74, 8/22/74, 8/26/74, 8/28/74, 8/29/74, 8/30/74, 9/3/74 and 9/4/74 filed
11/11/74	Motion requesting re-setting of bail filed (CASTELLANO)
11-11-74	Stenographers transcript filed dated August 27, 1974.
11/13/74	Govt's memorandum in opposition to deft's motion for dismissal (GILBERTO FERNANDEZ)
11/14/74	Voucher for compensation of counsel filed - (BUENO)
11/15/74	Letter from Alan Hirshman, esq. to chambers filed re: deft GILBERTO FERNANDEZ and adjournment of case
11/15/74	Before MISHLER, CH.J. - Case called - Sentence adjd to 11/22/74 at 9:30 A.M. as to deft GILBERTO FERNANDEZ and 11/13/74 at 4:00 P.M. as to deft CASTELLANO
11/18/74	Before MISHLER, CH.J. - Case adjd for sentencing on 11/22/74 at 9:30 A.M. on consent (CASTELLANO)
11/22/74	Before MISHLER, CH.J. - Case called - Deft PAUL CASTELLANO present with Nicholas Noguera Motion to set aside verdict, etc. denied - Deft sentenced to imprisonment for a period of 7 years on count 1 - court advised deft his right to appeal - clerk to file notice of appeal without fee
11/22/74	Judgment and Commitment filed - certified copies to Marshal (CASTELLANO)
11/22/74	Notice of appeal filed (CASTELLANO) (NO FEE)
11/22/74	Docket entries and duplicate of notice of appeal mailed to court of appeals (CASTELLANO)
11/22/74	Before MISHLER, CH.J. - Case called - Deft GILBERTO FERNANDEZ and counsel not present - Bench warrant ordered and stayed until 11/26/74 at 9:30 A.M. Sentence adjd to 11/26/74 at 9:30 A.M.
11-26-74	Before MISHLER, CH J - case called - deft GILBERTO FERNANDEZ &

CRIMINAL DOCKET

DATE	PROCEEDINGS
	Deft sentenced to a term of imprisonment of 5 years. Court advised the deft of his right to appeal. Clerk to file notice of appeal without fee - Bail conditions contd pending appeal.
11-26-74	Judgment & Commitment filed - certified copies to Marshal. (GILBERTO FERNANDEZ)
11-26-74	Notice of Appeal filed without fee (GILBERTO FERNANDEZ)
11-26-74	Docket entries and duplicate of Notice of Appeal mailed to C of A with Forms A & B and affidavit of financial status (GILBERTO FERNANDEZ)
11/27/74	By MISHLER, CH.J.- Copy of order releasing bail filed (CASTELLANO)
11-26-74	By MISHLER, CH J - Memorandum of Decision and Order filed denying motion of deft Gilberto Fernandez for dismissal prior to the commencement of trial on the ground that pre-indictment delay violated defts right to due process, etc
11/27/74	Certified copy of Judgment and Commitment ret'd and filed. Delivered to FDH (RAUL CASTELLANO)
12-1-74	Voucher for compensation of counsel filed (JUAN PEREZ)
12-12-74	Magistrate's file 74 M 1363 inserted into CR file.
12/20/74	Before MISHLER, CH.J.- Case called- Deft not present- Bench warrant ordered(LOPEZ)
12/20/74	Bench warrant issued
12/23/74	Voucher for compensation of counsel filed (BUENO)
12/24/74	Certified copy of Judgment and Commitment ret'd and filed- deft delivered to U.S. Penitentiary at Lewisburg Pa. (CASTELLANO)
3/4/75	Record on appeal certified and handed to Richard Seltzer for delivery to court of appeals (CASTELLANO, FERNANDEZ)

A TRUE COPY	
ATTEST	
DATED	1974
LEWIS ORGEL	
CLERK	
BY	DEPUTY CLERK

UNITED STATES OF AMERICA
S. DISTRICT COURT, N.Y.

- against -

JAN 23 1974

Cr. No.
(21 U.S.C., 843)
21 U.S.C., 843

MARIO BUENO
TEODORO CACERES a/k/a "Teo" MEAN.....
LUIS CALABRESE a/k/a "Luisito" PH.....
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ a/k/a "Toy Toy"
RAUL FERNANDEZ
ROBERTO FERNANDEZ
ROBERTO DIAZ JIMINEZ a/k/a "El Gaujiro"
AMADO LOPEZ
JOSE HASEO
JOSE MENDEZ a/k/a "Pepe"
RAUL ORTEGA
VICENTE ORTIZ a/k/a "Cuicaca"
DINO ROMANO a/k/a "Luis Belmonte"
JOHN DOE a/k/a "Chino Chang"
JOHN DOE a/k/a "Fillo" / *John Doe*

74CR 48

Defendants.

----- X
THE GRAND JURY CHARGES:

On or about and between the 1st day of January 1968 and the 31st day of December 1970, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, MARIO BUENO, TEODORO CACERES a/k/a "Teo", LUIS CALABRESE a/k/a "Luisito", DOMINGO COCA, RAUL CASTELLANO, GILBERTO FERNANDEZ a/k/a "Toy Toy", RAUL FERNANDEZ, ROBERTO DIAZ JIMINEZ a/k/a "El Gaujiro", AMADO LOPEZ, JOSE HASEO, JOSE MENDEZ a/k/a "Pepe", RAUL ORTEGA, VICENTE ORTIZ a/k/a "Cuicaca", DINO ROMANO a/k/a "Luis Belmonte", JOHN DOE a/k/a "Chino Chang" and JOHN DOE a/k/a "Fillo", the defendants, together with Manuel Noa, Segundo Coronel and Roberto Arenas, named herein as co-conspirators but not as defendants, and others known and unknown to the Grand Jury, wilfully, knowingly and unlawfully did combine, conspire, confederate and agree together and with each

1. It was part of said conspiracy that the defendants and co-conspirators fraudulently and knowingly would import and bring into the United States large quantities of heroin, a narcotic drug, contrary to law.

2. It was further a part of said conspiracy that the defendants and co-conspirators wilfully, knowingly and unlawfully would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large quantities of heroin, a narcotic drug, after the narcotic drug had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law.

3. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Eastern District of New York and elsewhere:

OVERT ACTS

1. In or about January 1968, defendant CALABRESE met with co-conspirator Coronel in Madrid, Spain.
2. In or about August 1968, defendant ROMANO met with co-conspirator Coronel in Queens, New York.
3. In or about August 1968, defendants BUENO and ROGELIO FERNANDEZ met with co-conspirator Coronel in New York, New York.
4. In or about September 1968, defendant JIMINEZ received approximately ten (10) kilograms of heroin from co-

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conspirator Coronel in New York, New York.

5. In or about November 1969, defendant SAGI REZ received approximately five (5) kilograms of heroin from co-conspirator Noa in New York, New York.

6. In or about November 1969, defendant LOPEZ received approximately two (2) kilograms of heroin from co-conspirator Noa in New York, New York.

7. In or about November 1969, defendant RAUL FERNANDEZ received approximately one (1) kilogram of heroin from co-conspirator Noa in New York, New York.

8. In or about December 1969, defendant JOHN DOE a/k/a "Chino Chang" received approximately five (5) kilograms of heroin from co-conspirator Noa in New York, New York.

9. In or about December 1969, defendant Mendez gave co-conspirator Noa a large sum of money in New York, New York.

10. In or about December 1969, defendant JOHN DOE a/k/a "Fillo" received about two (2) kilograms of heroin from co-conspirator Noa in New York, New York.

11. In or about December 1969, defendant COCA gave a large sum of money to co-conspirator Noa in New York, New York.

12. In or about December 1969, defendant WASEO received about one (1) kilogram of heroin from the co-conspirator Noa in New York, New York.

13. In or about December 1969, defendant CASTELLANO received approximately five (5) kilograms of heroin from co-conspirator Noa in New York, New York.

14. In or about December 1969, defendant ORTEGA received approximately five (5) kilograms of heroin from co-conspirator Noa in New York, New York.

15. In or about December 1969, defendant ORTIZ gave co-conspirator Coronel a large sum of money in New York, New York.

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16. In or about December 1969, defendant FERNANDEZ met with co-conspirator Noa in New York, New York. (Title 21, United States Code, Sections 173 and 174.)

A TRUE BILL.

Hubert S. Style
FOREMAN

Edward J. Boyd II
EDWARD J. BOYD V
United States Attorney *BOYD*
Eastern District of New York

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

74 Cr. 48 (JM)

MARIO BUENO
TEODORO CACERES aka "Teo"
LUIS CALABRESE aka "Luisito"
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ aka "Toy Toy"
RAUL FERNANDEZ
ROGELIO FERNANDEZ
ROBERT DIAZ JIMINEZ aka "El Gaujiro"
AMADO LOPEZ
JOSE MASEO
JOSE MENDEZ aka "Pepe"
RAUL ORTEGA
VICENTE ORTIZ aka "Cusicaca"
DINO ROMANO aka "Luis Belmonte"
JOHN DOE aka "Chino Chang"
JOHN DOE aka "Fillo"

MOTIONS FOR: DISMISSAL OF
INDICTMENT, SEVERANCE,
IMMEDIATE TRIAL, BILL OF
PARTICULARS & DISCOVERY

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
MAY 20 1974
TIME AM.....
P.M.....

Defendants.

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affirmation of STUART R. SHAW, ESQ., dated May 17, 1974, all of the proceedings heretofore had upon Docket No. 74 Cr. 48 before the Hon. J. Jacob Mischler, United States Court House, Cadman Plaza, Brooklyn, New York, on the 14th day of June 1974 at 9:30 a.m. in the fore noon of that day, or as soon thereafter as counsel can be heard, for the following pre-trial relief:

1. Dismissal of the Indictment herein upon the ground that the prosecution of the instant indictment subjects defendant to double jeopardy and double punishment in violation of the Sixth Amendment to the United States Constitution, in that the conspiracy charge of the instant indictment is, in law and in fact, the same conspiracy as that charged in Indictment No. 71 - 450 - CR-PF, upon which a judgment of conviction was entered upon the defendant on or about September, 1971; in the United States District Court for the Southern District of Florida in the case of U.S. v. Amado Lopez and Thomas Llerena before the Honorable Peter T. Fay.

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2. Severance of the trial of the defendant from that of any other defendant to the extent that the circumstances of such other defendant (fugitive status or other circumstances necessitating delay) are such that the trial in the instant case is likely to be further delayed if the defendants are to be tried jointly;

3. Severance of the trial of the defendant from that of any other defendant whose statements and/or admissions are to be introduced in evidence at trial, but which would be violative of the exclusionary principle enunciated in Bruton v. United States, 391 U.S. 123 (1968), with respect to the defendant Lopez;

4. An Order prohibiting the United States from using in evidence the fruits of any search and seizure or electronic surveillance with regard to which the defendant Lopez has standing as an aggrieved party, and which were secured in violation of his rights under the Fourth Amendment of the United States Constitution and 18 U.S.C. §§2510, et seq.;

5. An Order prohibiting the Government from using in evidence the fruits of any interrogation or identification of the defendant secured in violation of his rights under the Sixth Amendment (right to counsel) or Fifth Amendment (self-incrimination, due process of law) of the United States Constitution;

6. An Order granting to the defendant inspection of the Grand Jury minutes with regard to Indictment No. 71-450-CR-PF in the United States District Court for the Southern District of Florida and the instant indictment, in aid of the defendant's motion for dismissal of the indictment upon the ground of double jeopardy [Federal Rules of Criminal Procedure, Rule 6(e)];

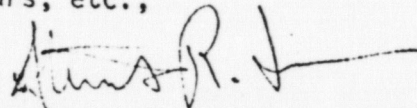
7. An Order directing that a pre-trial hearing be convened with regard to any unresolved factual issue necessary for the determination of each of the above requested items of relief;

8. Directing that the Government provide the defense with a Bill of Particulars of the Indictment, as set forth in Schedule I annexed hereto (prior to the return date of this motion, the Court will be advised as to which, if any, of the requested particulars, the Government consents to supply) [Rule 7, Federal Rules of Criminal Procedure];

9. An Order directing the Government to provide the defense with discovery and inspection, as specified in Schedule II annexed hereto (in advance of the return date of this motion, the Court will be advised as to which of the requested items of discovery and inspection the Government has consented to supply) [Rule 16, Federal Rules of Criminal Procedure and Due Process clause of the Fifth Amendment to the United States Constitution].

Dated: New York, New York
April 23, 1974

Yours, etc.,



STUART R. SHAW
Attorney for Defendant Amado Lopez
233 Broadway, Suite 3303
New York, New York 10007
(212) 233-8991

TO: Clerk
United States District Court
Eastern District of New York

Edward J. Boyd
United States Attorney
Eastern District of New York
Attn:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

74 Cr. 48 (JM)

AFFIRMATION

MARIO BUENO
TEODORO CACERES aka "Teo"
LUIS CALABRESE aka "Luisito"
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ aka "Toy Toy"
RAUL FERNANDEZ
ROGELIO FERNANDEZ
ROBERT DIAZ JIMINEZ aka "El Gaujiro"
AMADO LOPEZ
JOSE MASEO
JOSE MENDEZ aka "Pepe"
RAUL ORTEGA
VICENTE ORTIZ aka "Cusicaca"
DINO ROMANO aka "Luis Belmonte"
JOHN DOE aka "Chino Chang"
JOHN DOE aka "Fillo"

Defendants.

STUART R. SHAW, an attorney admitted to practice in the Courts of the State of New York, affirms the following to be true under penalty of perjury, pursuant to Pule 2106 CPLR:

1. I am the attorney for the defendant herein, AMADO LOPEZ, and I make this affirmation in support of the defendant's motions for pre-trial relief, to wit:

- A. Dismissal of the Indictment upon the ground of double jeopardy;
- B. Dismissal of the Indictment upon the ground that a speedy trial has not been afforded to the defendant, nor has he been afforded his right to a prompt disposition of the criminal charges against him;
- C. Separate trial from that of certain -defendants;
- D. Suppression of evidence obtained by means of illegal search and seizure and electronic surveillance;
- E. Suppression of evidence secured by means of illegal interroga-

F. Inspection of the Grand Jury minutes leading to this indictment and indictment 72 Cr. 628;

G. Pre-trial hearings with regard to the above-requested items of relief;

H. Bill of Particulars of the indictment;

I. Discovery and Inspection.

2. AMADO LOPEZ (hereinafter referred to as the defendant) has been named as one of seventeen defendants in a one-count indictment in the United States District Court for the Eastern District of New York. On January 23, 1974 the indictment was sealed under the order of the Hon. J. Orrin Judd. On March 12, 1974 the case was called and two of the defendants were produced in Court.

3. The indictment charges that the seventeen defendants conspired to import and bring into the United States large quantities of heroin, and unlawfully would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large quantities of heroin, and that the defendants and co-conspirators would conceal the existence of the conspiracy. The indictment states that the conspiracy took place on or about and between the first day of January, 1968 and the 31st day of December, 1970. The defendant, AMADO LOPEZ, was indicted on July 23, 1971 on a three count indictment under Case No. 71-450-CR-PF in the United States District Court in and for the Southern District of Florida. The defendant was arraigned on August 3, 1971 on the charge and the trial commenced on August 25, 1971. The defendant was found guilty and was sentenced on all three counts of the indictment. The defendant was convicted on count one of the indictment for conspiracy to possess with intent to distribute cocaine. The defendant was convicted and sentenced on count two of the indictment for distributing cocaine. The defendant was convicted and sentenced on count three of the indictment for distributing heroin. The defendant was sentenced to imprisonment as to count one and count two for seven years, and as to count three for three years, said sentences to run concurrently.

4. The indictment charges that the seventeen defendants engaged in a conspiracy from the first day of January, 1968 until the 31st day of December, 1970. The indictment charges the defendants with a violation of Sections 173 and 174 of Title 21 of the United States Code. Upon the effective date of the new statutes the former statutes (21 U.S.C., Sections 173 and 174) were repealed. Since the conspiracy in this case allegedly existed prior to May 1, 1971 the indictment alleges that the defendants violated or conspired to violate the now repealed statutes. It should be noted that the indictment under which the defendant was tried and found guilty in the United States District Court for the Southern District of Florida charged the defendant with violating the statutes which came into effect upon May 1, 1971. However, as previously noted, the new statutes supplant the old statutes, and in effect, indicate the same law.

5. The conspiracy under which the defendant was convicted during the prior prosecution in Florida allegedly took place in the year 1971. Said fact would ordinarily prevent this defendant from raising the defense of double jeopardy. However, the prosecution, the United States Attorney's Office for the Southern District, utilized evidence in the defendant's trial in the Southern District of Florida to convict the defendant that was based on an alleged sale of narcotic drugs in October of 1970. Said date, October of 1970, would fall within the purview of the allegations made in the instant indictment. Specifically, the government adduced this information in regard to a sale of narcotic drugs over the objection of defense counsel on the direct testimony of one LAZO, a witness called by the prosecution. Said testimony of the prosecution witness, CARLOS BANOS LAZO, begins at page 293 of the trial transcript of the defendant AMADO LOPEZ' case in the United States District Court for the Southern District of Florida. On direct examination by Mr. Keefe, the Assistant United States Attorney, starting at page 295, and continuing until page 297, the facts were presented before the jury that the defendant herein, AMADO LOPEZ, had sold

a dangerous drug. A copy of the pages of the transcript described above is attached hereto as defendant's Exhibit A. Defense counsel, in an attempt to dispel from the jury's mind the testimony given in regard to the alleged transfer and sale of a narcotic drug by AMADO LOPEZ attempted on cross-examination to question the witness LAZO's testimony. Defense counsel specifically questioned the witness LAZO at page 309 of said transcript, a copy of which is attached hereto as defendant's Exhibit B, and continued to cross-examine LAZO in regard to his previous record. The witness' previous record included convictions in regard to sale and distribution of heroin. The jury heard all of the testimony in regard to the alleged sale of a dangerous drug on October, 1970, and of the fact that the witness LAZO had been convicted in the past for heroin. (The examination of the witness LAZO goes on for many pages - however, defense counsel will make all of those pages available if requested.)

6. It is the defendant's contention that because of the fact that the trial judge in the Southern District of Florida permitted testimony in regard to a transfer and sale of dangerous drugs in October of 1970 and because of the fact that the jury presumably utilized said testimony in making their final determination and bringing in a verdict of guilty against the defendant LOPEZ, that a trial in the Eastern District in New York for violation of Federal Statutes for conspiracy to possess and distribute heroin would result in double jeopardy to the defendant AMADO LOPEZ. It is therefore argued that the case against defendant AMADO LOPEZ should be dismissed in the interest of justice.

7. Both the indictment in the Southern District of Florida and the instant indictment name AMADO LOPEZ as a conspirator and defendant. It is true that other defendants and conspirators are named in both indictments and that none of these other named individuals appear in both indictments. Nevertheless, it only takes two to make a conspiracy. We thus have an identical conspirator in both indictments.

8. The conspiracy count of the first indictment charges a conspiracy for possession with intent to distribute a narcotic drug controlled substances. In fact, the substances involved are cocaine and heroin. In the second indictment (the instant indictment) the controlled substance described is heroin. We therefore have an identical controlled substance, Heroin, in each case.

9. An Order prohibiting the United States from using in evidence the fruits of any search and seizure or electronic surveillance with regard to which the defendant Lopez has standing as an aggrieved party, and which were secured in violation of his rights under the Fourth Amendment of the United States Constitution and 18 U.S.C. §§2410, et seq.;

10. An Order prohibiting the Government from using in evidence the fruits of any interrogation or identification of the defendant secured in violation of his rights under the Sixth Amendment (right to counsel) or Fifth Amendment (self-incrimination, due process of law) of the United States Constitution;

11. An Order granting to the defendant inspection of the Grand Jury minutes with regard to Indictment No. 71 - 450-CR-PF in the United States District Court for the Southern District of Florida and the instant indictment, in aid of the defendant's motion for dismissal of the indictment upon the ground of double jeopardy [Federal Rules of Criminal Procedure, Rule 6 (e)];

12. An Order directing that a pre-trial hearing be convened with regard to any unresolved factual issue necessary for the determination of each of the above requested items of relief;

13. Directing that the Government provide the defense with a Bill of Particulars of the Indictment, as set forth in Schedule L annexed hereto (prior to the return date of this motion, the Court will be advised as to which, if any, of the requested particulars, the Government consents to supply) [Rule 7, Federal Rules of Criminal Procedure];

14. An Order directing the Government to provide the defense with discovery and inspection, as specified in Schedule II annexed hereto (in advance of the return date of this motion, the Court will be advised as to which of the requested items of discovery and inspection the Government has consented to supply) [Rule 16, Federal Rules of Criminal Procedure and Due Process clause of the Fifth Amendment to the United States Constitution].

WHEREFORE, counsel respectfully requests that the Court grant the relief requested in this affirmation and such other and further relief as the Court deems necessary and in the interest of justice to his client AMADO LOPEZ.

Dated: New York, New York
May 17, 1974

Duly affirmed,

Stuart R. Shaw

before February 20, 1976 , in default of which the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that the appellant may, without further order of the court, remove the record for purposes of preparation of

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

MARIO BUENO
TEODOR CACERES aka "Teo"
LUIS CALABRESE aka "Luisito"
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ aka "Toy Toy"
RAUL FERNANDEZ
ROGELIO FERNANDEZ
ROBERT DIAZ JIMINEZ aka "El Gaujiro"
AMADO LOPEZ
JOSE MASEO
JOSE MENDEZ aka "Pepe"
RAUL ORTEGA
VICENTE ORTIZ aka "Cusicaca"
DINO ROMANO aka "Luis Belmonte"
JOHN DOE aka "Chino Chang"
JOHN DOE aka "Fillo"

Defendants.

74 Cr. 48 (JM)

SCHEDULE I - REQUEST FOR
BILL OF PARTICULARS

1. Paragraph 1 of the indictment identifies certain of the defendant only by reference to pseudonyms and aliases. Provide the defense with the names and addresses of each such defendant. Provide the defense with the names and addresses of any and all co-conspirators unindicted or indicted in the future or named on the indictment in the future, whichever the case may be.

2. Paragraph 1 and subparagraph 1 of the indictment alleges that the defendants "did combine, conspire, confederate and agree together to violate Sections 173 and 174 of Title 21 of the United States Code". . . Subparagraph 1 goes on to quote "It was part of said conspiracy that the defendants and co-conspirators fraudulently and knowingly would import and bring into the United States large quantities of heroin, a narcotic drug, contrary to law. Specify:

- (a) The name or names of the countries that the narcotics were allegedly imported from;
- (b) The quantity of each such narcotic drug (heroin);
- (c) Whether the objective of the conspiracy was a single

importation or multiple importation of heroin and as to each such importation advise the defense as to whether the importation was in fact accomplished;

(d) As to each importation which was, in fact, accomplished, provide the defense with the date, time, place, circumstances, quantity, nature of drug, and individuals directly involved.

3. Subparagraph 2 of the indictment charges that the defendants conspired to " . . . receive, conceal, buy, sell and facilitate the transportation, concealment, and sale of large quantities of heroin . . ." Specify:

(a) The quantity of heroin involved;

(b) To the extent that this aspect of the conspiracy was, in fact, accomplished, in whole or in part, then specify the date, time, place, individuals directly involved, quantity and name of drug involved, and circumstances of each such transaction.

4. Subparagraph 3 of the indictment alleges that the defendants conspired to "conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. . ." Specify:

(a) The steps taken by each and every defendant and/or co-conspirator to prevent disclosure of the activities and/or conceal the existence of the conspiracy;

(b) The dates, times and places of the above-requested acts;

5. With regard to overt acts 1, 2, 3 and 16 specify the date and time of departure and arrival, the point of departure, the specific destination and the means of transportation (e.g., if by air the airline and flight number, etc.) of the events alleged therein.

6. With regard to overt acts 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 specify the date, time and exact place of delivery.

7. With regard to overt acts 11 and 15 specify the dates and times of departure and arrival, the point of departure, the specific destination, means of transportation, a description of the money involved (i.e., check, currency, denominations or otherwise) and the purpose of the act.

8. With regard to overt acts 1, 2, 3 and 16 specify the purpose of the act.

9. With regard to overt acts 3 and 6 specify dates, times, places of departure and arrival, describe whether or not any money changed hands, describe whoever else was present, describe the purpose of the act.

10. Specify all other overt acts known to the Government, but not alleged in the indictment, which the Government intends to prove at trial, and set forth in detail the dates, times, places and persons present with regard to each such act.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

MARIO BUENO
TEODORO CACERES aka "Teo"
LUIS CALABRESE aka "Luisito"
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ aka "Toy Toy"
RAUL FERNANDEZ
ROGELIO FERNANDEZ
ROBERT DIAZ JIMINEZ aka "El Gaujiro"
AMADO LOPEZ
JOSE MASEO
JOSE MENDEZ aka "Pope"
RAUL ORTEGA
VICENTE ORTIZ aka "Cusicaca"
DINO ROMANO aka "Luis Belmonte"
JOHN DOE aka "Chino Chang"
JOHN DOE aka "Fillo"

Defendants.

74 Cr. 48 (JM)

SCHEDULE II - REQUEST FOR
DISCOVERY AND INSPECTION

I. Electronic Surveillance

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure; the search and seizure provisions of the Fourth Amendment; the due process and self-incrimination clauses of the Fifth Amendment; and 18 U.S.C. §§ 2510-2520, the defendant moves the Court for an Order:

A. Directing the United States Government, through the United States Attorney, to conduct a thorough investigation and to advise the defendant whether he, or premises under his ownership, direction or control, have been the subject or target of electronic surveillance at the direction or instigation of any agency or operative of the Government.

B. Granting to the defendant discovery and inspection of all Court orders, recording tapes, notes, logs and transcripts with regard to any electronic surveillance disclosed under subsection A, supra.

C. Directing that, to the extent the disclosure requested under subsection "B" is not granted, that all such materials be produced for the

inspection of the Court, so that the Court may make an independent determination as to whether such materials should be provided to the defense.

D. Directing that all such existing electronic surveillance material which is not disclosed to the defense be marked, sealed, and kept in safe-keeping by the Clerk of this Court for the purpose of further review.

II. Search and Seizure

Pursuant to Rules 16 and 41(e) of the Federal Rules of Criminal Procedure, the search and seizure provision of the Fourth Amendment, and the Due Process and Self Incrimination provisions of the Fifth Amendment, the defendant moves the Court for an Order:

A. Directing that the prosecution advise the defendant as to whether the Government or anyone under its control or at its direction or instigation, searched for and/or seized from the defendant or from property under his ownership, direction or control, any document or tangible object, as well as the circumstances of such search and seizure.

B. Directing that the prosecution provide the defense with an opportunity to copy and inspect any materials which were seized from the defendant as described in subsection "A", supra.

III. Discovery and Inspection

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure and the due process clause of the Fifth Amendment, the defendant requests discovery and inspection, including permission to copy or photograph, as follows:

A. Statements of Defendant - any alleged statements, admissions, or confessions, including, statements (1) in writing, or (2) since reduced to writing, or (3) otherwise preserved, regardless of whether such statement was obtained with the knowledge and consent of the defendant.

B. Statements of Co-defendants - all statements, admissions or confessions made by any co-defendant whether reduced to writing or not, which tend to incriminate the defendant, in the possession of the Government or

otherwise known to the Government, and which the Government intends to use at a joint trial of the defendant and the co-defendants.

IV. Scientific Tests and Reports

All results and reports of any scientific tests or experiments made in connection with this case are hereby requested by the defendant.

V. Identification

The Government is requested to advise the defendant as to whether it intends to offer in evidence against him the fruits of any eye-witness or voice identification. If so, provide the defense with: 1) the date, place, time and type of each such identification; and 2) the name or names of the person or persons who made each such identification and of other persons who were present at each such identification.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JUL 31 1974

UNITED STATES OF AMERICA,

Plaintiff,

-against-

GILBERTO FERNANDEZ,

Defendant.

NOTICE OF MOTION TO
DISMISS INDICTMENT
DENIAL OF DUE PROCESS

DOCKET NO. 74 CR 48

S I R :

PLEASE TAKE NOTICE, that upon the indictment herein,
the annexed affidavit of ALAN L. HIRSHMAN, sworn to the ²⁹ day
of ~~April~~ ^{JULY}, 1974 and all the proceedings had herein, an application
will be made by the defense : at a stated term of the United
States District Court of the Eastern District of New York, for
the hearing of Criminal Motions, to be held at the United States
Courthouse, ~~Foley Square~~, on the ^{5th} day of ^{AUGUST}
1974, ^{BEFORE HON. JUDGE HIRSHMAN} at the opening of Court on that day, or as soon thereafter
as Counsel can be heard, for an order quashing the indictment and
each and every count thereof, upon the grounds that:

1. Said indictment is a denial of due process
because defendant is unable to defend himself, where complaint was
not sworn out until three years after alleged offenses.
2. Delay in swearing out the complaint is op-
pressive, purposeful and works prejudice against the defendant.
3. Pre-indictment delay is denial of due process
because defendant is unable to recall events of days in the alleged
offenses. A witness' memory has been so impaired by the delay

4. Prejudice must be presumed where p. -indictment delay is a minimum of three years and without a showing of "police enforcement necessity."

5. Prejudice must be presumed also where defendant has no recollection of the days in question, other than possibly being in another city on or about the days in question which may have included the days of the alleged offenses.

6. Prejudice must be presumed because no man can be expected to remember events which occur that far back.

7. Prejudice must be presumed where prosecution's case will undoubtedly consist of testimony from informers and from Narcotic Bureau Agents and their use of notebooks as memory refreshing items.

Dated: Brooklyn, New York,

April , 1974.

Yours, etc.,

ALAN L. HIRSHMAN
Attorney for Defendant
Office & P. O. Address
32 Court Street
Brooklyn, New York 11201
ULster 5-5066

TO: HON. EDWARD J. BOYD V
United States Attorney
Eastern District of New York

CLERK OF THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA,

DOCKET NO. 74 CR 48

Plaintiff,

-against-

AFFIDAVIT IN
SUPPORT OF MOTION
TO DISMISS INDICT-
MENT - DENIAL OF
DUE PROCESS

GILBERTO FERNANDEZ,

Defendant.

- - - - - X

STATE OF NEW YORK : COUNTY OF KINGS) SS.:

ALAN L. HIRSHMAN, being duly sworn, deposes and
says:

I am the attorney for the defendant, GILBERTO
FERNANDEZ, and am familiar with the facts and circumstances
relative to the indictment herein.

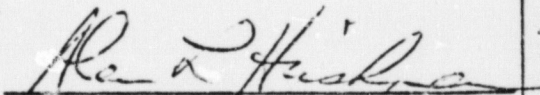
The Grand Jury returned an indictment against
GILBERTO FERNANDEZ charging him with the crime of violating Title
21, United States Code, Sections 173 and 174.

The crimes alleged occurred a minimum of three
years before any complaint, arrest or indictment was handed down
from the Grand Jury. All the evidence had been gathered some
time before the indictment causing prejudice to effective defense
and denial of Due Process by means of pre-indictment delay.

That no previous application has been made for
the relief sought herein.

WHEREFORE, I respectfully ask that an Order be
made herein dismissing the indictment.

Sworn to before me this


ALAN L. HIRSHMAN

29 day of ^{JULY} April, 1974.
ERNEST CHAPIRO

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

TDP:BIF:cva

United States Department of Justice

UNITED STATES ATTORNEY

EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

May 31, 1974

Stuart P. Shaw, Esq.
Leavy, Shaw & Horne
233 Broadway
Suite 3303
New York, New York 10007

Re: United States v. Amado Lopez, et.al.
Docket No. 74 CR 48

Dear Mr. Shaw:

As required by the Rules for the United States District Court for the Eastern District of New York, I am informally responding to your requests for a Bill of Particulars and for discovery and inspection. According to the numbering of your Schedules, the following information is provided:

A. Request for Bill of Particulars.

1. This paragraph contains several separate requests.

- a) John Doe a/k/a "Fillo" is now known to be Juan Perez.
- b) Government opposes request for defendants' addresses.
- c) Names of co-conspirators not named in indictment will be provided as they become known.

2. a) Government opposes this request.

- b) The approximate quantity of heroin involved during this conspiracy was 500 kilograms.
- c) There were regular importations and distributions of heroin.

EI

May 31, 1974

d) Government opposes this request.

3.

a) See 2(b) above.

b) Government opposes this request.

4. Government opposes this request.

5. Government opposes this request.

With regard to overt act 6, defendant Lopez received the specified quantity of heroin on the corner of 160th Street and Broadway, New York, New York. This occurred during the latter part of November 1969. The Government opposes the rest of this request.

7. Government opposes this request.

8. Government opposes this request.

9. With regard to overt act 6, defendant Lopez paid co-conspirator Noa \$17,500 per kilogram. No one else was present. The Government opposes the rest of this request.

10. Government opposes this request.

B, Request for Discovery and Inspection.

1. I know of no electronic surveillance conducted in connection with this case and know of no tape recordings made in connection with this case. I have also consulted with Special Agents of the Drug Enforcement Administration who have been or now are in charge of this investigation and they have advised me that no wiretaps or electronic eavesdropping were employed in any aspect of this investigation and no tape recordings were made in connection with this investigation.

2. Search and Seizure.

The Government represents that no search was made in connection with the transactions in this case

E2

May 31, 1974

and that no evidence was seized from any defendants or co-conspirators in connection with any of the transactions in this case.

3. Discovery and Inspection.

- a) There are no statements of the defendant Amado Lopez.
- b) The Government opposes this request.

4. Scientific Tests and Reports.

None

5. Identification.

- a) The Government represents that there have been no line-ups, show-ups or voice identifications in connection with this case.

Very truly yours,

DAVID L. TRAGER
United States Attorney

By:

Bernard J. Fried
Bernard J. Fried
Assistant U.S. Attorney

E3

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellees,

v.

AMADO LOPEZ,

Docket No. 76-1056

Defendant-Appellant.

BEFORE: IRVING R. KAUFMAN, Chief Judge

The court having appointed ~~XXXXXXXXXX~~ Stuart Shaw, Esq.
as counsel for Amado Lopez
pursuant to the Criminal Justice Act ~~by order dated~~
and being advised as to the progress of the appeal and that
notice of appeal was filed on January 9, 1976

IT IS HEREBY ORDERED that a copy of the transcript of testimony
shall be filed with the Clerk of the District Court on or
before February 20, 1976

IT IS FURTHER ORDERED that the record be ^{filed} ~~docketed~~ on or
before February 20, 1976, in default of which the appeal shall be
dismissed forthwith.

IT IS FURTHER ORDERED that the appellant may, without further
order of the court, remove the record for purposes of preparation of
the appellant's brief and appendix, provided that the record be
returned to the custody of the court on or before the date set for
filing the appellant's brief.

IT IS FURTHER ORDERED that eight (8) xerographic copies of the
appellant's brief and appendix be filed on or before March 22, 1976

IT IS FURTHER ORDERED that the appendix shall consist at least
of a copy of the docket entries, the indictment, the charge to the jury,
and any opinion of the court below.

IT IS FURTHER ORDERED that if such brief or appendix shall not
be filed by the date set the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that ten (10) copies of the brief of the
United States shall be filed on or before April 21, 1976

IT IS FURTHER ORDERED that the additional fifteen (15) copies of
the briefs required to be filed by counsel by Rule 31(b) F.R.A.P. shall
be retained by counsel subject to the call of the court for whatever
use it may direct until final disposition of the action.

IT IS FURTHER ORDERED that the United States may, without further

before February 20, 1976, in default of which the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that the appellant may, without further order of the court, remove the record for purposes of preparation of the appellant's brief and appendix, provided that the record be returned to the custody of the court on or before the date set for filing the appellant's brief.

IT IS FURTHER ORDERED that eight (8) xerographic copies of the appellant's brief and appendix be filed on or before March 22, 1976

IT IS FURTHER ORDERED that the appendix shall consist at least of a copy of the docket entries, the indictment, the charge to the jury, and any opinion of the court below.

IT IS FURTHER ORDERED that if such brief or appendix shall not be filed by the date set the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that ten (10) copies of the brief of the United States shall be filed on or before April 21, 1976

IT IS FURTHER ORDERED that the additional fifteen (15) copies of the briefs required to be filed by counsel by Rule 31(b) F.R.A.P. shall be retained by counsel subject to the call of the court for whatever use it may direct until final disposition of the action.

IT IS FURTHER ORDERED that the United States may, without further order of the court, file ten (10) copies of an appendix to its brief.

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of May 3, 1976

A. DANIEL FUSARO,
Clerk

Dated: February 6, 1976

F1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

- against -

AMADO LOPEZ,

Defendant-Appellant.

-----x

Docket No. 76-1056

MOTION TO EXTEND TIME TO
FILE BRIEF AND APPENDIX
ON APPEAL UNDER RULES
27, 31 and 26

Now comes the Defendant-Appellant in the above entitled matter and by his attorney, STUART R. SHAW moves this honorable court pursuant to Rules 27, 31 and 26 of the Federal Rules of Appellate Procedure for a sixty (60) day extension of time up to and including May 21, 1976 for the filing of Briefs and Appendix on Appeal covering the instant appeal. Additionally, the Defendant-Appellant moves this honorable court to extend time for the filing of Reply Briefs by the Assistant U.S. Attorney. As grounds for this motion counsel for the defendant-appellant states that: (1) the transcripts of the hearings in the lower court have not yet been completed by the court reporter and/or supplied to the attorney for defendant-appellant and (2) new facts and evidence in the form of an expected affidavit by the key witness who testified against the defendant-appellant that would exonerate the defendant-appellant of any wrong doing is expected upon the ability of counsel for the defendant-appellant

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to go to Florida and obtain same. Said witness, an acknowledged Government paid informant, is now incarcerated in the State of Florida.

WHEREFORE, defendant-appellant respectfully moves this Court for an Order enlarging the time within which he may submit his Brief and Appendix on Appeal until the 21st day of May, 1976, notwithstanding the expiration of the period originally prescribed by Order of this Court dated the 6th day of February, 1976 and for an Order granting the above stated relief and for such other and further relief as to this Court may deem necessary and proper.

Dated: New York, New York
March 16th, 1976

STUART R. SHAW
Attorney for Defendant-
Appellant
Office & P.O. Address
600 Madison Avenue
New York, New York 10022
(212) 755-5645

TO:

Clerk
Second Circuit
Court of Appeals
17th Floor
Poley Square
New York, New York

Hon. David C. Trager
United States Attorney for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
Attn: David DePetris, Esq.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellees,

Docket No. 76-1056

- against -

AFFIDAVIT

AMADO LOPEZ,

Defendant-Appellant.
-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

STUART R. SHAW, being duly sworn, deposes and says:

1. I am the attorney for AMADO LOPEZ, appointed by the Honorable Judge Jacob Mishler, senior Judge in the Eastern District of New York, under the CJA Rules. I was appointed to represent my client, on appeal at his sentence, before the above named Court on January 9, 1976.
2. My client, ARMADO LOPEZ, was convicted on a conspiracy charge after a four week trial held during the months of August and September, 1974, under Case #74 CR 48.
3. On January 9, 1976 I duly ordered certain minutes that were required in my opinion to process my client's appeal. Thereafter, I notified the Court stenographers in the Eastern District for my request of the minutes under the CJA Rules.
4. On and off during the entire month of January

and in the beginning of the month of February, 1976 I appeared in the Eastern District before the honorable Judge Jack Weinstein in the case of U.S. v. Kevelson, of counsel to another attorney. During that time period I spoke to different court stenographers including the head of the court stenographers, Mr. Karr, in regard to the minutes that I requested and why I had not received them. I thereafter went personally to the chambers of Judge Mishler and discussed the matter with him. Judge Mishler personally called the court stenographers, in my presence, and advised them to provide me with the minutes forthwith.

I continued to call the Eastern District court stenographers in regard to the minutes I needed. I remained in constant communication with Mrs. Cohen, who has recently been hired by the court stenographers to facilitate the processing of transcripts by Eastern District court reporters to attorneys on cases of appeal.

5. In early March I was advised by Mrs. Cohen that the reason for the delay in the minutes to me was because of the fact that a Mr. Bradley was the court stenographer who had taken the minutes and that he was no longer in the employ of the United States Government as a court stenographer and it was for that reason that I had not received the minutes. I tried to call Mr. Bradley at his home on several occasions and finally got in touch with him. He promised to provide me with the minutes.

6. On or about Tuesday, March 9th, Mr. Bradley

finally provided me with the minutes. However, they were not the complete minutes. I called him and spoke to him again and he insisted that I pay him for the minutes if I wanted all the minutes.

On late Friday, March 12, 1976 the minutes arrived and I gave Mr. Bradley my personal check for \$41.25, a copy of the bill, dated March 12, 1976 is attached hereto.

I read the minutes and realized at that point in time that in order to properly represent my client on appeal I would have to obtain minutes from the Southern District of New York regarding the procedure that my client was present at in January of 1976.

In my estimation those minutes are absolutely necessary for me to prepare this appeal.

7. In the beginning of the week of March 15, 1976 I began calling the court reporters in the Southern District of New York and Assistant U.S. Attorney David DePetris, the attorney representing the Government on the appeal.

The court reporters in the Southern District of New York do not know how long it will take to obtain the minutes from the Southern District procedure that I need to perfect this appeal.

Mr. DePetris advised me that the Government would not actively oppose my request for an extension of time in that the Government would take no position on my motion.

8. I would also like to take this opportunity to

advise the Court of recent facts that have come to my knowledge that would require additional time on my part to properly prepare my client's appeal.

I have attached hereto copies of articles from Miami newspapers that I did not receive until March 9, 1976 regarding the Government's key witness, RAMIRO GONZALEZ, whose testimony undoubtedly resulted in the conviction of my client. I have also enclosed copies of an indictment in Florida against the same RAMIRO GONZALEZ and an information. Said legal documents unequivocally charge the said RAMIRO GONZALEZ with homicide in the First Degree, for a double homicide he committed in broad daylight, before dozens of witnesses.

9. I have been advised by my client's family that the same RAMIRO GONZALEZ is ready to recant as to all the testimony he gave against my client as a paid Government informant during the trial when my client was convicted. I understand that he is prepared to sign an affidavit to this effect. Said situation would present a "Hurricane Carter" legal question to be argued before this honorable court.

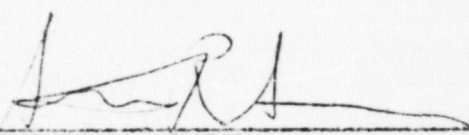
10. I believe that it would be necessary for me to go to Florida and interview RAMIRO GONZALEZ in regard to the above stated facts as soon as possible. If I am to do that I will be unable to work on the other points of appeal and prepare the appeal within the confines of the time allotted by this honorable court (copy of the Order is attached hereto). I do not honestly

feel that I can adequately represent my client on appeal until I personally interview RAMIRO GONZALEZ and present this Court with an affidavit to the effect that his testimony against my client was untrue.

11. This application is not made for the purpose of delay.

12. No previous application for enlargement and/or extension of time has been requested for the filing of said brief under Rules 26, 27 and 31.

WHEREFORE, I respectfully request at least two (2) months additional time to prepare the instant appeal for such other and further relief as this honorable court may deem necessary, proper and in the interest of justice.


STUART R. SHAW

Sworn to before me this
16th day of March, 1976.

FRANCIS M. POWERS
NOTARY PUBLIC, State of New York
No. 00411970
4th District, County
of Hamilton, State of New York
Commission Expires March 30, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA,

Docket No. 76-1056

Plaintiff-Appellees,

- against -

AFFIDAVIT OF SERVICE

AMADO LOPEZ,

Defendant-Appellant.

-----x

I, STUART R. SHAW, attorney for defendant-appellant in the above-entitled cause, hereby certify that on the 16th day of March, 1976 I served the attached Motion and Affidavit upon David Trager, Esq. and Assistant U.S. Attorney David DePetris, attorneys for Plaintiff-Appellees, by depositing a true copy in the United States mails, postpaid addressed to them at 225 Cadman Plaza East, Brooklyn, New York 11201, his last known address.



STUART R. SHAW
Attorney for Defendant-
Appellant
Office & P.O. Address
600 Madison Avenue
New York, New York 10022
(212) 755-5645

Mar.12, 1976

Court Reporter
894 Riverside Dr.
Apt. #2-E
New York, N.Y. 10032

TO:

Stuart R. Shaw, Esq.
600 Madison Avenue
23rd Floor
New York, N.Y.

Re: U.S.A. -vs- Lopez

For transcript of sentencing &
argument. (Daily copy)
15 pages @ \$.^{2.75}_{xx}

\$ 41.25

*Paid
Robert Bailey*

Police Search for Men Wanted in Two Murders

THE MIAMI HERALD
Sept. 7, 1935

Police are searching for two men who are wanted in connection with the murder of a woman in Miami and the murder of a man in Miami.

The man wanted in the murder of a woman in Miami is a white male, about 35 years of age, 5 feet 10 inches tall, 175 pounds, dark hair, blue eyes, and a mustache.

The man wanted in the murder of a man in Miami is a white male, about 35 years of age, 5 feet 10 inches tall, 175 pounds, dark hair, blue eyes, and a mustache.

Both men are wanted in connection with the murder of a woman in Miami and the murder of a man in Miami.

Police are searching for two men who are wanted in connection with the murder of a woman in Miami and the murder of a man in Miami.



Sketch of man wanted in murder.

Police are searching for two men who are wanted in connection with the murder of a woman in Miami and the murder of a man in Miami.

The man wanted in the murder of a woman in Miami is a white male, about 35 years of age, 5 feet 10 inches tall, 175 pounds, dark hair, blue eyes, and a mustache.

The man wanted in the murder of a man in Miami is a white male, about 35 years of age, 5 feet 10 inches tall, 175 pounds, dark hair, blue eyes, and a mustache.

Shoots in Beachy Saloon Kill Two, Wound Two

New drive
prepared for
wreck beach

Wreck beach
for...
...
...



88

STEP

RECEIVED

G-11

MIAMI NEWS
METRO MIAMI

Suspect eludes
police search

Severely burned
can't get care he ne

On June 26
by [illegible]

ADVERTISING
OFFICE
24 WEST MIAMI AVENUE
MIAMI, FLORIDA

76- 843

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR DADE COUNTY FALL TERM, 1975

RECEIVED
CLERK OF CIRCUIT COURT
DADE COUNTY, FLA.
03

76 JAN 28 PM 1 43

STATE OF FLORIDA

INDICTMENT

vs.

RAMIRO GONZALEZ also known
as INFANTE GONZALEZ also
known as RAMIRO GONZALEZ
INFANTE also known as
RAUL GARCIA DURAN,

DEFENDANT.

- I FIRST DEGREE MURDER
- II ASSAULT WITH INTENT TO
COMMIT FIRST DEGREE MURDER
- III POSSESSION OF A FIREARM BY
A CONVICTED FELON
- IV FIRST DEGREE MURDER
- V ASSAULT WITH INTENT TO
COMMIT FIRST DEGREE MURDER
- VI POSSESSION OF A FIREARM BY
A CONVICTED FELON

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 12th day of May, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, unlawfully and from a premeditated design to effect the death of one ANNA FERNANDEZ did kill and murder the said ANNA FERNANDEZ by shooting her with a pistol, a further and more particular description thereof being to the Grand Jurors unknown, contrary to Section 782.04 of the Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT II

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths,

present that on the 12th day of May, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously make an assault upon one RICARDO FERNANDEZ, SR., with intent to commit a felony, to-wit: Murder in the First Degree, as provided by 782.04 Florida Statutes, that is to say, the defendant, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously make an assault upon the said RICARDO FERNANDEZ, SR., by shooting him with a pistol and beating him with a pistol with a premeditated design to effect the death of the said RICARDO FERNANDEZ, SR., being in violation of 784.06 Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT III

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 12th day of May, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously have in his care, custody, possession or control a firearm, to-wit: a pistol, when at the said time and place the said RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, had

previously been convicted of a felony in a court of the United States, to-wit: a conviction on October 12, 1972, for the felony crimes of Sale of Heroin and Conspiracy to Sell Heroin, in the United States District Court, Southern District of New York, being in violation of 790.23 Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT IV

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of September, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, unlawfully and from a premeditated design to effect the death of one RICARDO FERNANDEZ, SR., did kill and murder the said RICARDO FERNANDEZ, SR., by shooting him with a pistol, a further and more particular description thereof being to the Grand Jurors unknown, contrary to Section 782.04 of the Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT V

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of September, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE

ously make an assault upon one ROLANDO FEBLES with intent to commit a felony, to-wit: Murder in the First Degree, as provided by 782.04 Florida Statutes, that is to say, the defendant, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously make an assault upon the said ROLANDO FEBLES with a deadly weapon, to-wit: a pistol, which said deadly weapon the defendant did then and there hold in his hand and aim and discharge at and toward the body of the said ROLANDO FEBLES with the premeditated design to effect the death of the said ROLANDO FEBLES, being in violation of 784.06 Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT VI

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 04th day of September, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously have in his care, custody, possession or control a firearm, to-wit: a pistol, when at the said time and place the said RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, had previously been convicted of a felony in a court

of the State of Florida, : a conviction on October 17, 1972,
for the felony crimes of Sale of Heroin and Conspiracy to
Sell Heroin, in the United States District Court, Southern
District of New York, being in violation of 790.23 Florida
Statutes, to the evil example of all others in like cases
offending and against the peace and dignity of the State of
Florida.

Daniel K. Gill

DANIEL K. GILL
FOREMAN OF THE GRAND JURY

BEST COPY AVAILABLE

FALL TERM, 1975

NO.

CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

STATE OF FLORIDA

vs.

RAMIRO GONZALEZ also known as
INFANTE GONZALEZ also known as
RAMIRO GONZALEZ INFANTE also
known as RAUL GARCIA DURAN,

DEFENDANT.

INDICTMENT

I FIRST DEGREE MURDER, II ASSAULT
WITH INTENT TO COMMIT FIRST DEGREE
MURDER, III POSSESSION OF A FIREARM
BY A CONVICTED FELONY, IV FIRST DEGREE
MURDER, V ASSAULT WITH INTENT TO COMMIT
FIRST DEGREE MURDER, VI POSSESSION OF A
FIREARM BY A CONVICTED FELON

Daniel K. Gill
DANIEL K. GILL

FOREMAN OF THE GRAND JURY

I HEREBY CERTIFY that I have
advised the Grand Jury, as
authorized by law, on the
attached indictment.

Richard E. Gerstein
RICHARD E. GERSTEIN
STATE ATTORNEY

Presented and filed in Open
Court, in the presence of the
Grand Jury, this 27 day of

January, 1976.

RICHARD P. BRINKER
CLERK, CIRCUIT COURT

BY: *R. P. Brinker*

STY

G Term, 19 75.

75-5777

THE STATE OF FLORIDA

INFORMATION FOR

vs.

RAMIRO GONZALEZ
also known as
R. INFANTE GONZALEZ
and
JORGE GONZALEZ

- I. ASSAULT WITH INTENT TO COMMIT MURDER (A, B, DEFT.) 784.06 (FEEL
- II. UNLAWFUL POSSESSION OF FIREARM WHILE ENGAGED IN CRIMINAL OFFENSE (A, DEFT.)

75 MAY 26 PM 4 45
CLERK OF DISTRICT COURT
DADE COUNTY, FLA.
03

FILED FOR RECORD

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that RAMIRO GONZALEZ also known as R. INFANTE GONZALEZ and JORGE GONZALEZ on the 12th day of MAY, 19 75, in the County and State aforesaid, did unlawfully and feloniously make an assault upon one RICARDO FERNANDEZ, SR., with intent to commit a felony, to-wit: MURDER IN THE FIRST DEGREE, as provided by 782.04 Florida Statutes, that is to say, the defendants RAMIRO GONZALEZ also known as R. INFANTE GONZALEZ and JORGE GONZALEZ, did unlawfully and feloniously make an assault upon the said RICARDO FERNANDEZ, SR., with a premeditated design to effect the death of the said RICARDO FERNANDEZ, SR., being in violation of 784.06 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

FILED
CLERK OF DISTRICT COURT
DADE COUNTY, FLA.
03
MAY 26 PM 4 45

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that RAMIRO GONZALEZ also known as R. INFANTE GONZALEZ and JORGE GONZALEZ on the 12th day of MAY, 19 75, in the County and State aforesaid, did unlawfully and feloniously make an assault upon one RICARDO FERNANDEZ, SR., with intent to commit a felony, to-wit: MURDER IN THE FIRST DEGREE, as provided by 782.04 Florida Statutes, that is to say, the defendants RAMIRO GONZALEZ also known as R. INFANTE GONZALEZ and JORGE GONZALEZ, did unlawfully and feloniously make an assault upon the said RICARDO FERNANDEZ, SR., with a premeditated design to effect the death of the said RICARDO FERNANDEZ, SR., being in violation of 784.06 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

HA:lw

6-26-75

Jail NO. 75-24778 Bkd. 5-16-75 Jkt. NO. 117122 "A"

Jail NO. 75-24203 Bkd. 5-13-75 Jkt. NO. 141160 "B"

75-M-13328, 13122

Master Calendar Team A

G18

COUNT II

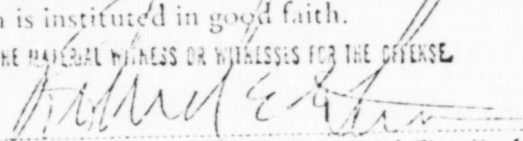
And RICHARD E. GERSTEIN State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, RAMIRO also known as R. INFANTE GONZALEZ on the 12th day of MAY, 1975, in the County and State aforesaid, did unlawfully and feloniously display a certain firearm, to-wit: A PISTOL, while at said time and place the defendant was committing a felony, to-wit: ASSAULT WITH INTENT TO COMMIT MURDER as provided by 784.06 Florida Statutes, the possession and display of said firearm as aforesaid, being in violation of 790.07 Florida Statutes,

contrary to the term of the Statute in such cases made and provided, and against the
nity of the State of Florida.

STATE OF FLORIDA:
COUNTY OF DADE:

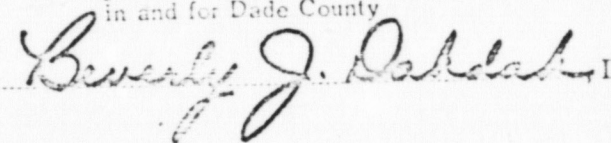
Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged and that this prosecution is instituted in good faith.

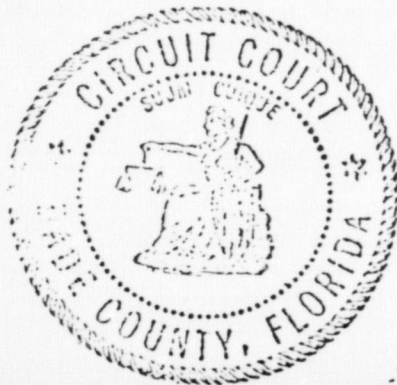
I FURTHER CERTIFY THAT TESTIMONY HAS BEEN RECEIVED UNDER OATH FROM THE MATERIAL WITNESS OR WITNESSES FOR THE DEFENSE.


State Attorney, Eleventh Judicial Circuit of Florida

Sworn to and subscribed before me this 26th day of June, 19 75.

Richard P. Brinker, Clerk
Circuit Court of the Eleventh
Judicial Circuit of Florida,
in and for Dade County

By:  D.C.



Case No.....

WITNESSES FOR THE STATE

CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

Ricardo Fernandez, Sr.
2975 N. W. 83rd Street
Miami, Florida

THE STATE OF FLORIDA

vs.

RAMIRO GONZALEZ
also known as
R. INFANTE GONZALEZ
and
JORGE GONZALEZ

INFORMATION FOR

- I. ASSAULT WITH INTENT TO COMMIT MURDER (A, B, DEFT.)
- II. UNLAWFUL POSSESSION OF FIREARM WHILE ENGAGED IN
CRIMINAL OFFENSE (A, DEFT.)

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellees,

v.

AMADO LOPEZ,

Docket No. 76-1056

Defendant-Appellant.

BEFORE: IRVING R. KAUFMAN, Chief Judge

The court having appointed ~~XXXXXXXXXX~~ Stuart Shaw, Esq.
as counsel for Amado Lopez
pursuant to the Criminal Justice Act ~~XXXXXXXXXX~~
and being advised as to the progress of the appeal and that
notice of appeal was filed on January 9, 1976

IT IS HEREBY ORDERED that a copy of the transcript of testimony
shall be filed with the Clerk of the District Court on or
before February 20, 1976

IT IS FURTHER ORDERED that the record be ~~docketed~~^{filed} on or
before February 20, 1976, in default of which the appeal shall be
dismissed forthwith.

IT IS FURTHER ORDERED that the appellant may, without further
order of the court, remove the record for purposes of preparation of
the appellant's brief and appendix, provided that the record be
returned to the custody of the court on or before the date set for
filing the appellant's brief.

IT IS FURTHER ORDERED that eight (8) xerographic copies of the
appellant's brief and appendix be filed on or before March 22, 1976

IT IS FURTHER ORDERED that the appendix shall consist at least
of a copy of the docket entries, the indictment, the charge to the jury,
and any opinion of the court below.

IT IS FURTHER ORDERED that if such brief or appendix shall not
be filed by the date set the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that ten (10) copies of the brief of the
United States shall be filed on or before April 21, 1976

IT IS FURTHER ORDERED that the additional fifteen (15) copies of
the briefs required to be filed by counsel by Rule 31(b) F.R.A.P. shall
be retained by counsel subject to the call of the court for whatever
use it may direct until final disposition of the action.

IT IS FURTHER ORDERED that the United States may, without further
order, file ten (10) copies of an appendix to its brief.

shall be filed with the clerk of the district court on or
before February 20, 1976

IT IS FURTHER ORDERED that the record be ~~submitted~~ filed on or
before February 20, 1976, in default of which the appeal shall be
dismissed forthwith.

IT IS FURTHER ORDERED that the appellant may, without further
order of the court, remove the record for purposes of preparation of
the appellant's brief and appendix, provided that the record be
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the briefs required to be filed by counsel by Rule 31(b) F.R.A.P. shall
be retained by counsel subject to the call of the court for whatever
use it may direct until final disposition of the action.

IT IS FURTHER ORDERED that the United States may, without further
order of the court, file ten (10) copies of an appendix to its brief.

IT IS FURTHER ORDERED that the argument of the appeal be ready
to be heard during the week of May 3, 1976

A. DANIEL FUSARO,
Clerk

Dated: February 6, 1976

621

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF PERSONAL SERVICE

not a party to the action, is over 18 years of age and resides at

That on the day of 19 at

deponent served the within

upon

by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein

Sworn to before me, this day of 19

Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is the

read the foregoing

the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

Sworn to before me, this day of 19

Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

of

named in the within action; that deponent has

read the foregoing

and knows the contents thereof; and that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true.

This verification is made by deponent because

is a

corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIRMATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the State of New York, affirms: That the undersigned is the attorney(s) of record for

in the within action; that the undersigned has read the foregoing

and knows the contents thereof; that the same are true to affirmant's own knowledge, except as to the matters therein stated to be alleged on information and belief; and as to those matters affirmant believes them to be true.

The undersigned further states that the reason this affirmation is made by the undersigned and not by

The grounds of affirmant's belief as to all matters not stated to be upon affirmant's knowledge, are as follows:

The undersigned affirms that the foregoing statements are true, under the penalty of perjury.

Dated:

19

Type or Print Name Below Signature

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the State of New York, does hereby certify, pursuant to Section 2105 CPLR, that I have compared the within with the original and have found it to be a true and complete copy thereof.

Dated: 19

Type or Print Name Below Signature

NOTICE OF ENTRY OR SETTLEMENT
(Check and complete appropriate box and section)

Sir(s):

PLEASE TAKE NOTICE that a

of which the within is a (true) (certified) copy

☐ NOTICE OF ENTRY

was duly entered in the within named court 19 on

☐ NOTICE OF SETTLEMENT

will be presented for settlement to the Hon.

one of the judges of the within named court at the Courthouse at

on 19

at o'clock M.

Dated: 19 Yours, etc.,

STUART R. SHAW

Attorney(s) for

Office and Post Office Address
600 MADISON AVENUE
NEW YORK, N. Y. 10022

To

Attorney(s) for

Docket No. 76-1056

Index No.

Year 19

UNITED STATES COURT OF
APPEALS FOR THE SECOND
CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

- against -

AMADO LOPEZ,

Defendant-Appellant.

MOTION FOR EXTENSION OF TIME
TO FILE BRIEF AND APPENDIX
ON APPEAL UNDER RULE 27,
31 and 26

STUART R. SHAW

Attorney(s) for Defendant-Appellant.

Office and Post Office Address

600 MADISON AVENUE
NEW YORK, N. Y. 10022
(212) 759-5043

To

Attorney(s) for

ADMISSION OF SERVICE

The undersigned acknowledges receipt of a copy of the within

on 19

at o'clock M.

Attorney(s) for

by:

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK

DIANE FUGALLI, being sworn, says:
I am not a party to this action; I am over 18 years of age; I reside at Bayside, New York

On March 16th, 1976 I served the within Motion and Affidavit upon David Trager, Esq. AUSA for the Eastern District of NY Plaintiff-

the attorney(s) for Appellees in this action, at 225 Cadman Plaza East, Brooklyn, New York the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Type or Print Name Below Signature

DIANE FUGALLI

Sworn to before me

this 16th day of March, 1976.

Notary Public for the State of New York
Qualified in the 1st County
Commission Expires March 31, 1976

United States Court of Appeals
for the Second Circuit

United States of America
Plaintiff-Appellee

Docket No. 76-1056

v.

Amado Lopez
Defendant-Appellant

BEFORE: IRVING R. KAUFMAN, Chief Judge

A motion having been made by Stuart Shaw, Esq.
counsel for appellant Amado Lopez, for an extension of
time to file a brief and appendix, the order of the court, dated
February 6, 1976, is amended as follows:

IT IS HEREBY ORDERED that the brief and appendix of
appellant be filed on or before May 17, 1976

IT IS FURTHER ORDERED that if appellant's brief or
appendix is not filed by the time directed, the appeal shall
be dismissed forthwith.

IT IS FURTHER ORDERED that the United States file its
brief on or before June 16, 1976

IT IS FURTHER ORDERED that the argument of the appeal
be heard during the week of July 19, 1976

A. Daniel Fusaro
A. Daniel Fusaro,
Clerk

Dated: March 18, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 CR 48

UNITED STATES OF AMERICA

-against-

Memorandum of Decision
and Order

AMADO LOPEZ,

Defendant.

December 1, 1975

MISHLER, CH. J.

Defendant Amado Lopez is one of 17 defendants charged with participation in a narcotics conspiracy, 21 U.S.C. §§173 and 174. Prior to trial, he moved to dismiss the indictment, claiming that it violated his fifth amendment right that "nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb."

Defendant's claim is based on a conviction after trial conducted in the Southern District of Florida in August, 1971, on an indictment charging defendant with violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (effective May 1, 1971). The indictment charged the defendant as follows:

- Count One: With conspiring with one Thomas Llerena to possess two kilograms of cocaine between May 6, 1971, and July 19, 1971, with intent to distribute (21 U.S.C. §846).
- Count Two: Possession of two kilograms of cocaine on July 3, 1971, with intent to distribute (21 U.S.C. §841(a)(1)).
- Count Three: Possession of 3.6 grams of heroin on May 6, 1971, with intent to distribute (21 U.S.C. §841(a)(1)).

The narcotics conspiracy charged in the case at bar alleges a far-flung narcotics business between January 1, 1968, and December 31, 1970, involving the importation, transportation, sale and distribution of large quantities of heroin. In addition to the 17 defendants charged, the indictment names Manuel Noa, Segundo Coronel and Roberto Arenas as co-conspirators.

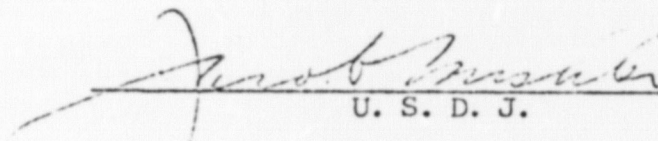
Defendant's supporting affirmation pointed to the testimony of one Carlos Benos Lazlo, to show the relationship between the conspirators. The government called Lazlo in the Florida trial, on rebuttal, to meet Lopez's testimony that he did not distribute "any cocaine whatsoever" (Tr. p. 259) and that he had never before dealt in narcotics. Lazlo testified he had a cocaine deal with the defendant, involving one kilogram of cocaine, in October, 1970.

Defendant's attempt to show the Florida drug conspiracy contemporaneous or overlapping in time with the conspiracy charged in the instant indictment must fail because the purpose of Lazlo's testimony was clear and because the Florida charge is not the charge here. Defendant was charged under different statutes. The difference in time periods could not be more evident since the Comprehensive Drug Abuse and Control Act, 21 U.S.C. §801 et seq., became effective when 21 U.S.C. §§173 and 174 expired, i.e., May 1, 1971. Further, the conspiracy charged here related to heroin while the Florida conspiracy dealt in cocaine; the government never named Llerena, Lopez's co-conspirator in the Florida case, conspirator in this conspiracy, nor did the government claim that any of the conspirators named here participated in the Florida conspiracy.

The conviction in the Southern District of Florida was not the same offense charged in the above indictment. United States v. Pacelli, 470 F.2d 67, 72 (2d Cir. 1972), cert. denied, 410 U.S. 983, 93 S.Ct. 1501 (1973), United States v. Nathan, 476 F.2d 456, 458 (2d Cir.), cert. denied, 414 U.S. 823, 94 S.Ct. 171 (1973).

The motion to dismiss the indictment is in all respects denied and it is

SO ORDERED.



U. S. D. J.

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK
4 -----x

5 UNITED STATES OF AMERICA :

6 -versus- :

7 AMADO LOPEZ, :

8 Defendant :

74 CR 48

9 -----x

10
11 United States Courthouse
12 Brooklyn, New York

13 January 9, 1976
10:30 A.M.

14
15 B e f o r e:

16 HONORABLE JACOB MISHLER,

17 U.S.D.J.
18
19
20
21
22

23 ROBERT BRADLEY
24 Acting Official Court Reporter
25

J-1

Appearances:

DAVID G. TRACER, Esq.
United States Attorney

BY: D.A. Depetris, Esq.
Assistant United States Attorney

STUART R. SHAW, Esq.
Attorney for the Defendant

1 THE CLERK: The United States of America
2 versus Amado Lopez.

3 THE COURT: Swear in the interpreter.

4 L I B Y A C L I N C Y, having been duly sworn by
5 the Clerk of the Court as interpreter.

6 THE COURT: Mr. Lopez, do you have anything
7 to say before the court imposes sentence on you?

8 MR. LOPEZ: Well, I have given a letter to
9 the interpreter the other time I was here and I
10 would like to know, I gave it to the interpreter
11 and I would like the interpreter to read it to the
12 Judge. I don't know whether you got it or not.

13 THE COURT: Who did you give it to?

14 MR. LOPEZ: I want her to read it to you
15 because I wrote it in Spanish.

16 THE COURT: When?

17 MR. LOPEZ: The trip that I came over the
18 day that I was before this court.

19 THE COURT: Well, can you tell me what you
20 said in the letter?

21 MR. LOPEZ: The letter said that -- well,
22 that -- it asked that you be considerate towards
23 me. The years that I spent out in the streets I
24 spent with my wife and daughter. My father is a
25 sick man. He had two spinal operations. And, well,

1 everything is in your hands.

2 THE COURT: How much of it is in the report,
3 I don't know, but I read the report.

4 Mr. Lopez, do you have anything else to
5 say before the court imposes sentence on you?

6 MR. LOPEZ: Well, after you have sentenced
7 me, I would like you to, please, assign Stuart
8 Shaw for the appeal because I have no money.

9 THE COURT: Were you retained counsel?

10 MR. SHAW: Yes.

11 THE COURT: I can't assign any lawyer to
12 prosecute the appeal. The Court of Appeal does
13 that. But in all likelihood they will appoint Mr.
14 Shaw. As a matter of fact, as a matter of policy
15 they appoint the same lawyer who tried the case.

16 MR. LOPEZ: Okay, thank you very much.

17 THE COURT: But what I can do is to make
18 a determination as to whether you are entitled to
19 the benefit of the Criminal Justice Act.

20 Have you filed an affidavit?

21 MR. SHAW: No, but the report indicates,
22 and I admit that he does owe counsel fees of \$3,000.
23 I have advised the court that I saw his family and--

24 THE COURT: Well, supposing you fill that
25 out after the sentence.

1 Do you have anything to add to what Mr.
2 Lopez has said, Mr. Shaw?

3 MR. SHAW: I would just like to indicate for
4 the record that on a previous court date I had some
5 question in the Probation Report that had been done.
6 And I brought some documents to dispute that. But
7 he has updated the report which I was privileged to
8 see today with the court's permission. And the
9 probation department's permission.

10 The probation department has updated the
11 report and made it accurate. I do not see any
12 inaccuracies in it.

13 I would just ask Your Honor to be as lenient
14 as possible with my client.

15 I know the three judge panel has sat and
16 considered what sentence would be best for Mr. Lopez.

17 I know Your Honor has spent a lot of time
18 on this. And the amount of time that has been spent
19 is because of the fact that my client did not plead
20 guilty to escaping from West Street. That sentence
21 now comes up almost a year and a third later.

22 But the fact remains that he will appear
23 before Judge Worker on the 17th, and he will be
24 sentenced there.

25 He was originally serving, as the report

1 indicates, one to seven years in Federal Prison
2 in Atlanta on a narcotic conviction in the Southern
3 District of Florida.

4 The co-defendants that were sentenced and
5 found guilty in that case received five, five and
6 seven years respectively.

7 I would only state this, and I feel I can
8 honestly state that out of those that were convicted
9 by a jury, the one that the jury had the most
10 problem in convicting, Your Honor, was my client.

11 They called back after several days of
12 deliberations, Your Honor will recall that it was
13 during the Rosh Hoshana holidays that they called
14 back to have the transcript read and reread regarding
15 the testimony against my client.

16 And I would ask Your Honor to be as merciful
17 as possible and do not take into consideration, if
18 at all possible, the fact that he did escape, because,
19 indeed, he will be punished for that.

20 I would like to point out that of all those
21 who pleaded guilty in the indictment of the Southern
22 District, this is the one who pleaded to one count
23 and one count only allowed by the United States
24 Attorney, and I didn't represent them, that they
25 pleaded guilty to just the escape, and not to any

1 thing else that the others were involved in.

2 I would ask that the punishment and sentencing
3 for the crime which I admit that he didn't stand trial
4 for, and he said he was guilty, that that be left to
5 Judge Worker.

6 And I say to you to take into consideration
7 that the one year that he was out on the streets,
8 as he put it, he spent that time, and I think it has
9 been substantiated in the Probation Report, with
10 his wife, that being his second wife that he
11 married in 1971.

12 And there has been no new indictment or
13 anything that has come up for what he did in that
14 one years time.

15 He was, of course, wrong and pleaded guilty
16 to the escape. But the fact remains that he was
17 not involved in narcotics for one year, and spent
18 the time with his wife and family.

19 I would ask you to be as merciful as possible
20 and give him as few years as possible to give con-
21 current time, if possible; and in that way maybe
22 he will be able to rejoin his family in some way
23 to try to carry on activities legally.

24 THE COURT: How do we know that he didn't
25 do anything? He wasn't caught, you mean?

1 MR. SHAW: Well--

2 THE COURT: Why should I assume that this
3 defendant was leading a perfectly normal conventional
4 and lawful existence after his escape?

5 MR. SHAW: Well, Your Honor, he testified
6 and told Judge Worker and told the probation
7 department, and I think that has been substantiated,
8 that he was with his family, his wife, and that he
9 participated in no illegal activities.

10 THE COURT: This conspiracy was between
11 January 1, '68 to December 31, 1970. He was con-
12 victed in the Southern District of Florida for that
13 activity.

14 In 1971 subsequent to the time of this
15 conspiracy he was convicted for carrying a concealed
16 firearm.

17 MR. SHAW: That was when he was out on
18 bail pending the appeal.

19 THE COURT: Right.

20 MR. SHAW: That is correct, Your Honor.

21 THE COURT: The Judge gave him a break for
22 one day in jail, plus five years probation.

23 Then he was convicted again of carrying a
24 concealed firearm and he got a break again, two and
25 a half years concurrent with the federal sentencing.

1 You have no proof that he didn't commit a
2 crime during the period and I won't charge him
3 with any crime that I know nothing about. But I
4 don't think that he should be given credit because
5 he was: . arrested during the period of his escape.

6 MR. SHAW: Well, Judge, I am not exactly
7 saying that. What I am trying to say is it appears
8 as though the defendant assures me that he does
9 have a record, and from what you have just read,
10 and from what I stated earlier where he was wrong.
11 He claims, and he admits his guilt and he has taken
12 a guilty plea. When he says that he didn't do
13 something, Your Honor, he didn't go to jail, and
14 Your Honor heard that before --

15 THE COURT: I heard him in effect put some
16 witness on, I heard a woman get on the stand and
17 say, no, this really isn't the fellow who was
18 involved. He looks like his brother. And he sat
19 there and heard that, and I must assume that he
20 manipulated that perjury testimony.

21 MR. SHAW: I don't think he could manipulate
22 anything.

23 THE COURT: That was as phony as a three
24 dollar bill that testimony of that woman who was
25 Mr. Lopez' sister or some relations to him.

1 MR. SHAW: She wasn't his wife or anything
2 else. There were three witnesses, two men that
3 came up that worked in the store of the family and
4 then this woman. And the man was in jail at all
5 times and was not visited by the woman. I have
6 the records of --

7 THE COURT: I don't expect you to character-
8 ize that testimony, but I will. That was as blatant
9 a liar as I have ever heard from a witness stand.

10 MR. SHAW: Well, Judge, I kept telling
11 you that there was a brother of Amado that had a
12 name --

13 THE COURT: The name of all his brothers
14 begin with the letter A. His father just didn't
15 get off the first letter of the alphabet. Amado,
16 Albert, and Analdo.

17 MR. SHAW: It was an interesting case because
18 we had a family --

19 THE COURT: Mr. Shaw, I am talking about
20 that testimony, and you tell me something, is it
21 coincidence that the brother that he said he looked
22 like was probably involved in the narcotics?

23 MR. SHAW: Accordingly he was convicted
24 and spent four months in jail for one of the brothers.

25 THE COURT: Was that just a coincidence that

1 she said he looked like this particular defendant?
2 That he was a duplicate. That you couldn't tell
3 them apart?

4 MR. SHAW: Well, some people are confused
5 between brothers.

6 THE COURT: Sure, if you want to be sometimes
7 without even trying. But if you try very hard to
8 be confused, you can be.

9 Do you have a picture of the brother?

10 MR. DEPETRIS: There was no picture at the
11 trial, Your Honor. I had asked for one, but there
12 was not one.

13 MR. SHAW: I don't have a photograph, Judge.
14 There is a family resemblance. I didn't recognize
15 my client with his hair all cut.

16 THE COURT: You didn't recognize your client?

17 MR. SHAW: No, when I walked in the room, and
18 then I realized it was him.

19 THE COURT: What does that prove?

20 MR. SHAW: Nothing.

21 THE COURT: The woman could have told the
22 truth on the stand. I didn't ask her to lie. I
23 didn't put the question to her. Somebody asked her
24 to lie. She sat there and knew that it was a lie.

25 MR. SHAW: I don't know exactly, Judge --

1 THE COURT: I am not saying that you asked
2 her . Mr. Shaw. But when you tell me about how
3 rational and truthful this man is, I say that is a
4 misrepresentation. I think he is closer to the
5 other side.

6 MR. DEPETRIS: If I can just add one point,
7 Your Honor.

8 THE COURT: Yes.

9 MR. DEPETRIS: During the course of the
10 trial Mr. Lopez was brought up from Atlanta, Mr.
11 Fierconie who was serving a federal sentence, the
12 defense said it was be calling Mr. Fierconie at
13 the trial. Mr. Fierconie was one of the other
14 individuals who escaped from West Street, but he
15 was never called.

16 MR. SHAW: I don't think that has anything
17 to do with this here. Furthermore, I am talking
18 about his honesty, and not presenting Mr. Fierconie.
19 Mr. Fierconie was not presented as a witness, and
20 I don't think that has any bearing here on the
21 sentence.

22 THE COURT: It may have some bearing on the
23 Southern District's charge.

24 I am considering only the participation of
25 the conspiracy and his record.

1 MR. SHAW: Well, his record certainly isn't
2 unblemished.

3 THE COURT: Yes.

4 MR. SHAW: He does have a wife and children
5 from his previous marriage.

6 THE COURT: Mr. Lopez, the jury having
7 found you guilty of the charge in the indictment,
8 I sentence you to the custody of the Attorney
9 General or his authorized representative who will
10 choose a place of confinement for a term of fifteen
11 years.

12 I direct that that sentence imposed run
13 concurrently with the sentence imposed in the
14 Southern District of Florida on October 5, 1971.

15 Having imposed sentence, Mr. Lopez, I must
16 advise you as to your constitutional rights to
17 appeal.

18 You must file a Notice of Appeal within
19 ten days to reserve your rights to appeal.

20 If you can't afford a lawyer as you have
21 indicated that you can't, the Court of Appeal will
22 appoint a lawyer under the Criminal Justice Act.
23 The government will pay all costs of the appeal.

24 MR. LOPEZ: Yes, I would like to have one
25 assigned because I don't have any money.

1 THE COURT: If you will fill out that form,
2 sit at counsel's table and fill it out with Mr.
3 Shaw, and I will make a determination. Will you
4 do that?

5 MR. LOPEZ: Yes.

6 MR. SHAW: Your Honor, I would just like to
7 say I don't want to characterize my conversation
8 with you at this point of talking against a stone
9 wall. But the fact remains that you gave my client
10 fifteen years. I think the evidence bears out where
11 in quantity of kilograms that he was the least
12 involved of all those sentenced, and to give him
13 as much time as the other three put together, you
14 are now giving Mr. Lopez fifteen years --

15 THE COURT: I think you were right when you
16 started off that you didn't want to talk against a
17 stone wall. I might tell you and you might be
18 interested in knowing, one of the judges thought he
19 should get ten consecutive to his present sentence.
20 I wasn't the only one that fixed it that way.

21 The other one said twelve years, but didn't
22 say whether consecutive or concurrent.

23 I am inclined to believe that he would have
24 made it consecutive to the present sentence.

25 MR. SHAW: Your Honor, does this begin at

1 this time?

2 THE COURT: It begins today. I will give
3 him credit on the sentence that he was serving.
4 This is all retroactive from today.

5 (Time Noted: 11:00 A.M.)

6 (Recess)

7 THE CLERK: The United States of America
8 versus Amado Lopez.

9 THE COURT: I find that the defendant is
10 entitled to the benefit of the Criminal Justice
11 Act.

12 Mr. Lopez, I have directed the Clerk to
13 file a Notice of Appeal for you.

14 Do you want me to do that?

15 MR. LOPEZ: Yes, Your Honor.

16 THE COURT: The Clerk is directed to file
17 a Notice of Appeal.

18 I suppose fixing bail is moot in this case?

19 MR. DEPETRIS: Yes. He is serving time on
20 the Florida charge.

21 (Time Noted: 11:05 A.M.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
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UNITED STATES OF AMERICA, :
:
vs. :
:
MARIO ANTHONY PERNA, et al, :
:
Defendants. :
:
-----X

[Handwritten signature]
74 Cr. 1018

Before:

HON. HENRY F. WERKER,
District Judge.

New York, January 19, 1976.
(Room 129)

APPEARANCES:

THOMAS J. CAHILL, Esq.,
United States Attorney for the
Southern District of New York;
BY: JOHN P. FLANNERY, II, Esq.,
Assistant United States Attorney.

STUART SHAW, Esq.,
Attorney for Defendant
Nelson Garcia.

HERBERT BROWN, Esq.,
Attorney for Defendant
Amado Lopez.

JACK GOLDBERG, Esq.,
Attorney for Defendant
John DeBenidictus.

ROBERT BLOSSNER, Esq.,
Attorney for Defendant
Richard Malizia.

STEPHEN RUSSO, Esq.,
Attorney for Defendant
Nicholas Pretino.

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2 (Open court.)

3 THE CLERK: For sentencing in the case of
4 United States of America versus Mario Anthony Perna.

5 MR. FLANNERY: The Government is ready, your
6 Honor.

7 THE CLERK: Defendant Nelson Garcia.

8 MR. SHAW: Defendant is ready, your Honor.

9 THE COURT: Mr. Shaw, do you have anything to
10 say on behalf of the defendant?

11 MR. SHAW: Yes, your Honor.

12 If your Honor please, I would like just for the
13 moment to indicate to the Court in regard to Mr. Lopez, I
14 don't see his attorney here yet, that your Honor is
15 aware I represented Mr. Lopez in the Eastern District
16 before Mishler. I would like to advise the Court if
17 the Court does not know yet that he received 15 years in
18 the Eastern District, which is pretty close to the estim-
19 ation I gave to your Honor at the time there were plea
20 negotiations.

21 If I may be permitted, your Honor, I would like
22 to say two or three things in regard to Mr. Garcia.
23 I know that you have a lot of work to do, but I also know
24 that you are prepared, you have gone over the probation
25 report and know a lot about Mr. Garcia and his background.

THE CLERK: Amado Lopez.

THE COURT: Do we have an interpreter?

MR. SHAW: The Marshal indicated to me, your Honor --

THE MARSHAL: I called for the interpreter and she was supposed to be here in 15 minutes.

THE COURT: THE COURT: All right, we will take a short recess until she arrives.

(Recess.)

MR. SHAW: If your Honor please, in the interim I went up to try to look for an interpreter, and I came down and asked Mr. Lopez in the best Spanish I could muster if he wanted to utilize my services today or if he wanted to wait for Mr. Brown, and at that point he said he wanted Mr. Brown even though earlier on he indicated to me in Spanish that it would be all right for me to proceed. The interpreter has arrived since, and you can ask her, your Honor. I asked her to put the same question to him, and he said he wants Brown now, so I am willing to go forward, as I said before, your Honor.

THE COURT: Yes.

Let's swear the interpreter.

(Sylvia Aquiler was duly sworn as Spanish interpreter.)

1
2 THE COURT: Miss Aguiler, has Mr. Lopez
3 indicated to you that he wants to have Mr. Brown represent
4 him at this sentencing?

5 THE INTERPRETER: Yes, he has.

6 THE COURT: What if anything did you learn
7 about Mr. Brown's whereabouts?

8 MR. FLANNERY: I called his office just
9 moments ago when I learned that he wanted Mr. Brown to be
10 present, and Mr. Brown's secretary told me that 45 minutes
11 ago he called her from Brooklyn, and I asked if he ever
12 intended to come here, and she said she was certain that
13 he was on his way to this Court House, but he hadn't told
14 her that.

15 THE COURT: All right. I am going to remand
16 the defendant to the Marshal and when Mr. Brown arrives
17 we will get the defendant back in the courtroom.

18 Mr. Shaw, you are excused for the moment.

19 MR. FLANNERY: Your Honor, could I just ask one
20 question?

21 The defendant looks somewhat different than
22 previously, and I know that there is a twin, or a resembling
23 brother over there, and I would just like to have him
24 state for the record that he is the Lopez named in the
25 indictment.

1
2 MR. SHAW: I would indicate to the U. S.
3 Attorney that I indicated earlier to the Court when I saw
4 Mr. Lopez earlier before in the Eastern District I was
5 taken aback, but I sincerely believe this is the man I
6 represented in the Eastern District in 1974 and the same
7 man who was a co-defendant with my client, Mr. Garcia,
8 and I don't think there is anything wrong in your saying
9 what your name is to the Court.

10 DEFENDANT LOPEZ: My name is Amado Lopez.

11 THE COURT: And you are the person who is named
12 in this indictment?

13 DEFENDANT LOPEZ: Yes.

14 MR. FLANNERY: Thank you, your Honor.

15 MR. SHAW: I would indicate, your Honor, that
16 there was a question in the Eastern District case before
17 Judge Mishler between an Amado and Amando, and in fact
18 when I went to see this man the first time along with
19 Mr. Brown in the new Federal Correction Center he was
20 listed incorrectly as Amando.

21 THE COURT: All right.

22 MR. SHAW: And I apologize for this morning,
23 your Honor.

24 THE COURT: All right.

25 MR. FLANNERY: Your Honor, how will we know when

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Mr. Brown --

THE COURT: We will have to let you know when
Mr. Brown arrives. We will hold Mr. Brown in protective
custody when he does arrive.

(Recess.)

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1
2 THE CLERK: United States of America versus
3 Amado Lopez.

4 Is the Government ready?

5 MR. FLANNERY: The Government is read, your
6 Honor. I believe it is Amado Lopez.

7 THE COURT: Yes. Amado, A-m-a-d-o.

8 MR. BROWN: Defendant is ready, your Honor.

9 Your Honor, off the record, if I may apologize
10 for being late --

11 THE COURT: Late is not the word, Mr. Brown.

12 MR. BROWN: I realize that, your Honor.
13 I had gone into court to hand in an affidavit asking the
14 Court's permission to withdraw because it was a helpless
15 case, and one word led to another and the end of it I think
16 I may win that case, I was so shocked. It's similar
17 to a Midwood High School against the Pittsburgh Steelers.

18 THE COURT: All right.

19 MR. BROWN: I got carried away on that case.

20 THE COURT: Miss Aguiler, you are reminded
21 that you are still under oath as the interpreter.

22 THE INTERPRETER: Yes.

23 THE COURT: Do you have anything to say on
24 behalf of Mr. Lopez, Mr. Brown?

25 MR. BROWN: Yes, your Honor. I have read the

1 report. There are a few things that the report does not
2 bring out, your Honor. While the defendant was out
3 illegally he was with his wife, his present wife, and
4 supporting three of her children and one of his.
5

6 I would also point out, your Honor, that the
7 reason this defendant did escape wrongfully or rightfully
8 is because he felt there was an injustice done on him and
9 he took it upon himself to escape.

10 He was not one of the ringleaders, he was a
11 passenger. The doors were open. He was damn sure
12 he was going to go out. The doors were there. He was
13 going to go out.

14 There has been no trouble with him while he was
15 out, your Honor. He informs me that his wife has been
16 ill and is ill and he would like an opportunity some time
17 if not while he is still young, some time to see her. He
18 has just been sentenced to 15 years, your Honor, close to
19 the maximum, by Judge Mishler.

20 There was some off the record discussion
21 between Judge Mishler and the attorney and at the time that
22 this defendant escaped I believe Judge Mishler indicated
23 that he would sentence this defendant to quite a term so
24 that he can think over his escape, to the maximum.

25 In any event, your Honor, I ask the Court's

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indulgence and mercy and ask that any sentence that is imposed upon this defendant be imposed concurrently, not consecutively, your Honor. 15 years, considering what his offense was is quite -- was quite heavy, your Honor, and I don't believe that any further time will contribute to this man's rehabilitation or anything further, except another pound of his flesh.

THE COURT: All right.

Will you ask Mr. Lopez if he has anything to say on his own behalf?

DEFENDANT LOPEZ: This year that I was out on the street I spent it with my wife and I didn't have any sort of problems. That's why I feel if any sentence you impose should run concurrently, because I already have so much time.

THE COURT: Anything else?

DEFENDANT LOPEZ: No.

THE COURT: Mr. Flannery.

MR. FLANNERY: I just have a few remarks, your Honor.

This defendant was a significant violator during the time that he was on the street notwithstanding the fact that apparently he lived in a quiet concealed seclusion for the year after his escape. His escape was

2 not as he would have the Court believe getting on one of
3 the very many lines in prison and mistakenly disappearing
4 into the street and just wandering helplessly for a year.
5 He knew before he left by conversations with Garcia
6 that he was going to go for some weeks before he did go,
7 and in fact knew that on his behalf Mr. Garcia thought
8 with the defendant Bererra so that he could go along
9 because Berrera and the others were against him coming
10 along.

11 It's no accident, your Honor, that all the
12 people who escaped were narcotics violators. Several of
13 them had made arrangements for distribution after their
14 escape. If no or little additional time is imposed on
15 Lopez because he already faces a 15-year sentence, others
16 will be encouraged and not deterred from following a
17 parallel course of conduct.

18 THE COURT: All right.

19 Mr. Lopez, is there any reason why the Court
20 should not now sentence you?

21 MR. BROWN: Your Honor, may I be heard concern-
22 ing the statement?

23 THE COURT: Yes.

24 MR. BROWN: Your Honor, there was issue, and
25 one of the reasons we took the plea where there was no

1 cms
2 question that he did withdraw, there was no issue as to
3 that, that he did escape. But the issue and the reason --
4 and it was not necessary to go to trial, the issue is how
5 much advance notice. I maintain, your Honor, defendant
6 maintains that he had no advance notice except for that
7 day.

8 I would also say, your Honor, that within the
9 period of 15 years to 18 years or 19 years to 20 years,
10 your Honor, a difference of whether or not is this,
11 because he is sentenced, because he is going to serve
12 instead of 15 years, 20 years or 25 years, your Honor,
13 is not going to reform or help or make the Federal Prison
14 system any safer or any tighter.

15 MR. FLANNERY: Just a brief remark, your Honor.
16 I mean, there are situations where as a deterrent and for
17 punishment alone sentences should be imposed, and this
18 defendant going along with the remarks I have mentioned
19 earlier, one of the reasons he did escape and did change
20 his mind was because he had recently been sentenced to
21 seven years and he felt himself as a young adult with his
22 life destroyed, and that he told, and there are witnesses
23 who would have appeared at trial to testify, that that was
24 his reason for going.

25 THE COURT: All right, I will ask him once

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mo e.

Mr. Lopez, is there any legal reason why the Court should not now sentence you?

DEFENANT LOPEZ: Well, if you feel you should sentence me, what can I say.

THE COURT: All right.

DEFENDANT LOPEZ: No.

THE COURT: All right.

This sentence is imposed as a punishment and as a deterrent. I am sentencing you to two years under 4208(a)(2) to be served consecutively after your present sentence.

You are moving to dismiss the other counts, Mr. Brown?

MR. BROWN: Yes, your Honor.

MR. FLANNERY: The Government does not object.

THE COURT: The other count may be dismissed. The defendant is remanded to the custody of the Marshals.

I (we) hereby certify that the foregoing is a true and correct copy of the transcript of my (our) trial and proceedings as they (our) proceedings.

[Signature]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

No. 71-450-Cr-PF

v.

21 USC §841(a)(1)

AMADO LOPEZ and
THOMAS LLERENA

21 USC §846

M/S - \$5,000/15 yrs.

(Filed: July 23, 1971)

INDICTMENT

The Grand Jury charges that:

COUNT I

From on or about May 6, 1971 continuing until
on or about July 19, 1971, at Miami, Dade County, in the
Southern District of Florida,

AMADO LOPEZ and

THOMAS LLERENA

and others not named in the indictment and presently to
the Grand Jury unknown did combine, conspire, and agree
to possess with intent to distribute approximately two
kilograms of cocaine, a Schedule II narcotic-controlled
substance; in violation of Title 21, United States Code,
Section 841(a)(1).

It was further part of the conspiracy that the
defendant would conceal the existence of the conspiracy
and would take steps designed to prevent the disclosure
of their activities.

L-1

That the defendants heretofore named did commit in furtherance of said conspiracy and to effect the objects thereof the following overt acts:

OVERT ACTS

1. On or about July 3, 1971, at Miami, Florida, Amado Lopez met with a cooperating individual.

2. On or about July 16, 1971, at Miami, Florida, Amado Lopez and Thomas Llerena met with a Special Agent of the Bureau of Narcotics and Dangerous Drugs.

3. On or about July 19, 1971, at Miami, Florida, Amado Lopez met with a Special Agent of the Bureau of Narcotics and Dangerous Drugs.

All in violation of Title 21 United States Code Section 846.

COUNT II

On or about July 3, 1971, at Miami, Dade County, in the Southern District of Florida

AMADO LOPEZ

did knowingly and intentionally distribute approximately two (2) kilograms of cocaine, a Schedule II narcotic-controlled substance; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT III

On or about May 6, 1971, at Miami, Dade County, in the Southern District of Florida.

AMADO LOPEZ

did knowingly and intentionally distribute approximately 3.6 grams of heroin, a Schedule I narcotic-controlled substance; in violation of Title 21 United States Code, Section 841(a)(1).

A TRUE BILL

s/ Carrio D. Bufario
FOREMAN

ROBERT W. RUST

UNITED STATES ATTORNEY

s/ Harold F. Keefe

By: Harold F. Keefe
Assistant U.S. Attorney

--

No. _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

THE UNITED STATES OF AMERICA

VS.

AMADO LOPEZ and THOMAS LLERENA

INDICTMENT

21 USC §841(a)(1)
21 USC §846

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

SPRING

Term, 19 75.

75-5777

THE STATE OF FLORIDA

INFORMATION FOR

vs.

RAMIRO GONZALEZ
also known as
R. INFANTE GONZALEZ
and
JORGE GONZALEZ

- I. ASSAULT WITH INTENT TO COMMIT
MURDER (A, B, DEFT.) 784.06 (FEL.
II. UNLAWFUL POSSESSION OF FIREARM
WHILE ENGAGED IN CRIMINAL OFFENSE
(A, DEFT.)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting
for the State of Florida, in the County of Dade, under oath, information makes that
RAMIRO GONZALEZ also known as R. INFANTE GONZALEZ and JORGE GONZALEZ
on the 12th day of MAY, 19 75, in the County and State
aforesaid, did unlawfully and feloniously make an assault upon
one RICARDO FERNANDEZ, SR., with intent to commit a felony, to-
wit: MURDER IN THE FIRST DEGREE, as provided by 782.04 Florida
Statutes, that is to say, the defendants RAMIRO GONZALEZ also known
as R. INFANTE GONZALEZ and JORGE GONZALEZ, did unlawfully and
feloniously make an assault upon the said RICARDO FERNANDEZ, SR.,
with a premeditated design to effect the death of the said
RICARDO FERNANDEZ, SR., being in violation of 784.06 Florida
Statutes, contrary to the form of the Statute in such cases made
and provided, and against the peace and dignity of the State
of Florida.

CLERK OF DISTRICT COURT
DADE COUNTY, FLORIDA
03

75 MAY 26 PM 4 45

FILED FOR RECORD

one RICARDO FERNANDEZ, SR., with intent to commit a felony, to-
wit: MURDER IN THE FIRST DEGREE, as provided by 782.04 Florida
Statutes, that is to say, the defendants RAMIRO GONZALEZ also known
as R. INFANTE GONZALEZ and JORGE GONZALEZ, did unlawfully and
feloniously make an assault upon the said RICARDO FERNANDEZ, SR.,
with a premeditated design to effect the death of the said
RICARDO FERNANDEZ, SR., being in violation of 784.06 Florida
Statutes, contrary to the form of the Statute in such cases made
and provided, and against the peace and dignity of the State
of Florida.

HA:lw

6-26-75

Jail NO. 75-24778 Bkd. 5-16-75 Jkt. NO. 117122 "A"

Jail NO. 75-24203 Bkd. 5-13-75 Jkt. NO. 141160 "E"

75-11-13328, 13122

Master Calendar Team A

COUNT II

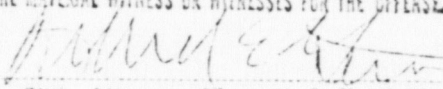
And RICHARD E. GERSTEIN State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, RAMIRO also known as R. HIRFANTE GONZALEZ on the 12th day of MAY, 1975, in the County and State aforesaid, did unlawfully and feloniously display a certain firearm, to-wit: A PISTOL, while at said time and place the defendant was committing a felony, to-wit: ASSAULT WITH INTENT TO COMMIT MURDER as provided by 784.06 Florida Statutes, the possession and display of said firearm as aforesaid, being in violation of 790.07 Florida Statutes,

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged and that this prosecution is instituted in good faith.

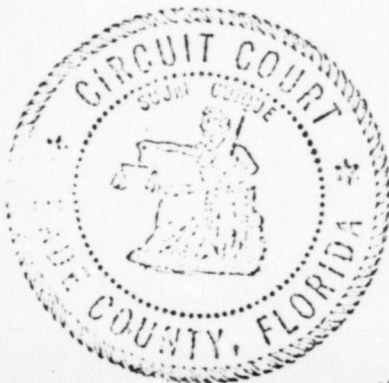
I FURTHER CERTIFY THAT TESTIMONY HAS BEEN RECEIVED UNDER OATH FROM THE MATERIAL WITNESS OR WITNESSES FOR THE OFFENSE.


State Attorney, Eleventh Judicial Circuit of Florida

Sworn to and subscribed before me this 26th day of June, 19 75.

Richard P. Brinker, Clerk
Circuit Court of the Eleventh
Judicial Circuit of Florida,
in and for Dade County

By:  D.C.



Case No.....

WITNESSES FOR THE STATE

CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

Ricardo Fernandez, Sr.
2975 N. W. 83rd Street
Miami, Florida

THE STATE OF FLORIDA

vs.

RAMIRO GONZALEZ
also known as
R. INFANTE GONZALEZ
and
JORGE GONZALEZ

INFORMATION FOR

- I. ASSAULT WITH INTENT TO COMMIT MURDER. (A, B, DEFT.)
- II. UNLAWFUL POSSESSION OF FIREARM WHILE ENGAGED IN
CRIMINAL OFFENSE (A, DEFT.)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR DADE COUNTY

FALL TERM, 1975

STATE OF FLORIDA

INDICTMENT

vs.

RAMIRO GONZALEZ also known
as INFANTE GONZALEZ also
known as RAMIRO GONZALEZ
INFANTE also known as
RAUL GARCIA DURAN,

DEFENDANT.

- I FIRST DEGREE MURDER
- II ASSAULT WITH INTENT TO
COMMIT FIRST DEGREE MURDER
- III POSSESSION OF A FIREARM BY
A CONVICTED FELON
- IV FIRST DEGREE MURDER
- V ASSAULT WITH INTENT TO
COMMIT FIRST DEGREE MURDER
- VI POSSESSION OF A FIREARM BY
A CONVICTED FELON

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 12th day of May, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, unlawfully and from a premeditated design to effect the death of one ANNA FERNANDEZ did kill and murder the said ANNA FERNANDEZ by shooting her with a pistol, a further and more particular description thereof being to the Grand Jurors unknown, contrary to Section 782.04 of the Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT II

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths,

CLERK OF DISTRICT COURT
DADE COUNTY, FLA.
03

76 JUN 23 PM 1 48

FILED FOR RECORD

present that on the 12th day of May, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously make an assault upon one RICARDO FERNANDEZ, SR., with intent to commit a felony, to-wit: Murder in the First Degree, as provided by 782.04 Florida Statutes, that is to say, the defendant, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously make an assault upon the said RICARDO FERNANDEZ, SR., by shooting him with a pistol and beating him with a pistol with a premeditated design to effect the death of the said RICARDO FERNANDEZ, SR., being in violation of 784.06 Florida Statutes, to the evil example of all others in like case offending and against the peace and dignity of the State of Florida.

COUNT III

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 12th day of May, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously have in his care, custody, possession or control a firearm, to-wit: a pistol, when at the said time and place the said RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, had

previously been convicted of a felony in a court of the United States, to-wit: a conviction on October 12, 1972, for the felony crimes of Sale of Heroin and Conspiracy to Sell Heroin, in the United States District Court, Southern District of New York, being in violation of 790.23 Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT IV

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of September, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, unlawfully and from a premeditated design to effect the death of one RICARDO FERNANDEZ, SR., did kill and murder the said RICARDO FERNANDEZ, SR., by shooting him with a pistol, a further and more particular description thereof being to the Grand Jurors unknown, contrary to Section 792.04 of the Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT V

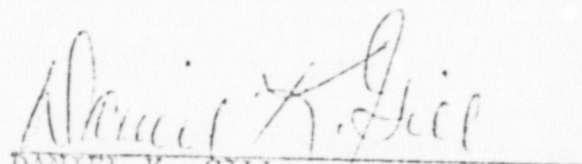
The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of September, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE

also known as RAUL GARCIA DURAN, did unlawfully and feloniously make an assault upon one ROLANDO FEBLES with intent to commit a felony, to-wit: Murder in the First Degree, as provided by 782.04 Florida Statutes, that is to say, the defendant, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously make an assault upon the said ROLANDO FEBLES with a deadly weapon, to-wit: a pistol, which said deadly weapon the defendant did then and there hold in his hand and aim and discharge at and toward the body of the said ROLANDO FEBLES with the premeditated design to effect the death of the said ROLANDO FEBLES, being in violation of 784.06 Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT VI

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of September, 1975, within the County of Dade, State of Florida, RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, did unlawfully and feloniously have in his care, custody, possession or control a firearm, to-wit: a pistol, when at the said time and place the said RAMIRO GONZALEZ also known as INFANTE GONZALEZ also known as RAMIRO GONZALEZ INFANTE also known as RAUL GARCIA DURAN, had previously been convicted of a felony in a court

of the United States, to-wit: a conviction on October 12, 1972,
for the felony crimes of Sale of Heroin and Conspiracy to
Sell Heroin, in the United States District Court, Southern
District of New York, being in violation of 90.23 Florida
Statutes, to the evil example of all others in like cases
offending and against the peace and dignity of the State of
Florida.


DANIEL K. GILL
FOREMAN OF THE GRAND JURY

N-5

FALL TERM, 1975 NO.

CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

STATE OF FLORIDA

vs.

RAMIRO GONZALEZ also known as
INFANTE GONZALEZ also known as
RAMIRO GONZALEZ INFANTE also
known as RAUL GARCIA DURAN,

DEFENDANT.

INDICTMENT

I FIRST DEGREE MURDER, II ASSAULT
WITH INTENT TO COMMIT FIRST DEGREE
MURDER, III POSSESSION OF A FIREARM
BY A CONVICTED FELONY, IV FIRST DEGREE
MURDER, V ASSAULT WITH INTENT TO COMMIT
FIRST DEGREE MURDER, VI POSSESSION OF A
FIREARM BY A CONVICTED FELON

Daniel K. Gill
DANIEL K. GILL
FOREMAN OF THE GRAND JURY

I HEREBY CERTIFY that I have
advised the Grand Jury, as
authorized by law, on the
attached indictment.

Richard E. Gerstein
RICHARD E. GERSTEIN
STATE ATTORNEY

Presented and filed in Open
Court, in the presence of the
Grand Jury, this 27 day of

January, 1976.

RICHARD P. BRINKER
CLERK, CIRCUIT COURT

BY: *M. Kleminski*

Index to Record on Appeal

Page 122 - Court transcript of proceedings dated
November 7, 1975

That repeated requests were made of the District Court, Honorable Judge Jacob Mishler, for the minutes of these proceedings. Judge Mishler refused to permit counsel to order these minutes under the CJA. Counsel already expended \$41.25 to Robert Bradley, Court Reporter, copy of bill attached hereto, and counsel felt constrained to order these minutes.

Please refer to the latter portion of the statement of facts describing the double jeopardy motion and Point VI of the Brief on double jeopardy.

Index to Record on Appeal

Page 123 - Court transcript of proceedings
dated December 5, 1975

The same situation pertains to Page 123 as
to Page 122, Exhibit O-1.

Please see Page 122 for explanation.

Mar.12, 1976

Robert Bradley
Court Reporter
894 Riverside Dr.
Apt. #2-E
New York, N.Y. 10032

TO:

Stuart R. Shaw, Esq.
600 Madison Avenue
23rd Floor
New York, N.Y.

Re:-U.S.A. -vs- Lopez

For transcript of sentencing &
argument. (Daily copy)
15 pages @ \$.^{2.75}

\$ 41.25

*Paid
Robert Bradley*

1 to their attention.

2 I will try to remember to say use care and
3 scrutinize it closely and I may lump them all together,
4 accomplice testimony, felon --

5 MR. HIRSHMAN: How about a self confessed
6 perjurer?

7 Arenas confessed to that at the last trial.

8 THE COURT: I wish you gave it to me in the
9 request to charge.

10 MR. HIRSHMAN: I thought it was covered.

11 THE COURT: Don't you see what you are doing?
12 You are coming in here ten minutes before the charge
13 is to start and you are giving me requests to charge.
14 I will try to do the best I can.

15 I have got it in mind, and I have a method of
16 charging and what I am going to say I have in mind.

17 Because I charge in part extemporaneously, it
18 does not unduly upset what I am going to say, but I
19 will do the best I can.

20 MR. HIRSHMAN: Thank you very much.

21 (The jury entered the court room at 10:15 a.m.)

22 THE COURT: Mr. Foreman and ladies and
23 gentlemen of the jury, the trial of the case of
24 United States versus Teodoro Caseres, also known as
25 Teo, Raul Castellano, Gilberto Fernandez, also known

P1

1 as Toy Toy, Amado Lopez and Jose Mendez commenced
2 almost a month ago on August 19th.

3 For reasons that we talked about during the
4 trial, we suspended all the weekends and the first
5 week of September we suspended on Wednesday, the 4th,
6 and came back on the 9th, but I would like to think
7 of this as a trial that commenced on August 19th and
8 continued to this point, hoping thereby to bring your
9 attention to the importance of trying to recall as
10 much as testimony as came before you, starting with the
11 19th.

12 The lawyers very ably brought to your attention
13 the testimony that each party felt was of importance
14 and I think that was a significant aid in recalling to
15 you the testimony of the trial.

16 This is called an adversary proceeding. The
17 litigants, the Government on the one hand and then
18 the defendants on the other are adverse parties and
19 they oppose each other on contested issues.

20 The theory underlying an adversary trial is
21 that through the contest the lawyers will develop the
22 evidence on the issues and present it to the jury for
23 the jury to see.

24 It is the jury's important function to seek out
25 the truth in the evidence that was developed during

P2

1 the trial.

2 Now, this was a hotly contested trial and the
3 lawyers in the performance of their duties in the
4 highest sense of the word took objection when they
5 felt it was necessary to protect their clients' rights
6 and you should not have any feeling of resentment or
7 antagonism because the lawyers took objection. That
8 is their job. If they did any less, I think I should
9 be the first criticize them, and in the heat of the
10 battle, I had occasion to admonish lawyers, and there
11 were times when I thought that in their zeal they
12 over stepped the bounds of propriety, but I am con-
13 vinced that the arguments, the objections, the state-
14 ments were made in good faith and again this is the
15 United States against the defendants named and the
16 lawyers are only their advocates and it would be
17 improper and unfair to take out any subconscious or
18 conscious resentment against the client.

19 I have called your attention to the function of
20 the lawyers, but a jury trial is a two-sided effort,
21 and the two sides being the jury and the court.

22 The Court is the sole judge of the law. That
23 means that the Court's rulings must be observed. They
24 are final and absolute in this trial. It means that
25 the jury must accept the law that the Court charges.

P3

1 You may disapprove of a principle or even a
2 statute that I will shortly read. You may not like
3 it, but you have an absolute duty to accept it as the
4 law of the case. It makes for predictability and
5 uniformity. If every jury decided to go off on its
6 own and decide what the law should be and apply what
7 each juror thought the law should be, we would have
8 pure chaos.

9 Just as the Court is the sole judge of the law,
10 so the jury is the sole judge of the facts. You and
11 you alone decide the contested issues, all the con-
12 tested issues.

13 I will outline all of the essential elements
14 of the crime charged. You will decide the issues of
15 credibility, all based on the law as I charge you.

16 Having decided the issues of fact you will
17 make the ultimate decision as to the guilt or innocence
18 of each defendant.

19 Now, in this charge I may refer to defendant
20 or defendants. Defendant collectively, as opposed to
21 the prosecution, the Government, or defendants, in
22 the plural; but the charge will apply to all unless I
23 single out an individual defendant.

24 Now, as I told you repeatedly during the trial
25 and as the lawyers reminded you, each defendant is an

1 individual and he is to be judged by what he did, and
2 though there are principles concerning evidence that
3 is chargeable to some, even though one did not perform
4 the act or take part in the conversation, laying aside
5 that principle and I will describe the application, I
6 have charged you during the trial also, so you have
7 some familiarity of it; the guilt or innocence of each
8 defendant is to be judged separately and it is as if
9 it were five separate trials.

10 During the trial I may have made some statements.
11 The statements are not evidence.

12 During the trial I may have asked some questions.
13 Do not attach any special significance to the questions
14 that I asked.

15 I did it in the main only because I thought
16 there was some confusion in my mind and if there was
17 in my mind I thought it might have been confusing to
18 you and so I had hoped that the question might have
19 cleared up the confusion in the subject matter.

20 In the caption and during the testimony you
21 heard the use of various nicknames. There is nothing
22 wrong in the use of a nickname and you should draw
23 no adverse inference from use by the defendants of
24 nicknames.

25 (Cont'd on next page.)

MM:bd
lam2

At the outset of this trial when you were being selected as jurors, I referred to the presumption of innocence. It is a time-honored presumption in Anglo-American law.

It requires the jury to conclude at the outset of the trial that the defendant is innocent of the crime charged and that presumption prevails throughout the trial and throughout your deliberations and is sufficient to acquit the defendant unless and until and if the Government proves the guilt of the defendant by proof beyond a reasonable doubt.

You have heard the term reasonable doubt, possibly before you entered this trial as jurors, but now it should have particular significance to you. You heard it throughout the trial and counsel referred to it in the summations.

A reasonable doubt is a doubt which a reasonable person has after weighing all of the evidence.

It is a doubt based on reason and common sense and experience as distinguished from a doubt based on emotion or speculation or suspicion.

It is not a vague or imaginary doubt.

A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act in a

1
2 matter of importance to himself.

3 Proof beyond a reasonable doubt is therefore
4 proof of such a convincing character that you would
5 be willing to rely and act upon unhesitatingly in the
6 most important and weighty of your own affairs.

7 The Government's burden is not to prove the
8 guilt of the defendant beyond all doubt nor is it the
9 Government's burden to prove to you that any particula
10 testimony is true beyond all reasonable doubt.

11 The Government's burden is to prove all the
12 essential elements of the crime charged beyond a
13 reasonable doubt.

14 I will charge you on what those essential
15 elements are later in the charge.

16 A reasonable doubt may arise from the failure
17 of the Government to produce evidence.

18 The defendants do not have to prove their
19 innocence. They do not have to offer any evidence.

20 On the contrary, the defendants have a right
21 to rely on the failure of the Government to prove the
22 guilt of the defendant beyond reasonable doubt.

23 In this case the defendant, the witness Pena
24 was called by the defendant Fernandez and he offered
25 evidence of the defendant Fernandez's reputation for
truth, veracity and as a law-abiding citizen.

P7

1 Such evidence may raise a reasonable doubt.
2 It may occur to you that a man of such a reputation
3 would not commit the crime charged.

4 Of course that is part of the proof and you
5 consider it when you consider the guilt or innocence
6 of Mr. Fernandez to make that determination.

7 In summation counsel for Fernandez properly
8 argued that the Government failed to produce certain
9 witnesses. This included Special Agent Buckley, the
10 landlord of 346-49th Street and others.

11 Now, the Government has the burden of proving
12 its case beyond a reasonable doubt. The Government
13 does not have the obligation of bringing in everybody
14 who might have some knowledge of some of the issues in
15 the case. If it occurs to you that the witnesses
16 referred to would have been cumulative, in other
17 words added already to the testimony in the trial, and
18 would have served no purpose, you can judge the
19 importance of the failing to bring that witness in by
20 the Government.

21 On the other hand it is important that you
22 understand that all the defendants have the power of
23 subpoena and they have the right, not the obligation,
24 but the right to bring in any witness they thought
25 might help their case.

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2
3 Again I remind you, the Government has the
4 burden of proving the guilt of the defendant by proof
5 beyond a reasonable doubt.

6 The Government has the obligation of bringing
7 in those witnesses to support the burden of proving
8 the guilt of the defendant beyond a reasonable doubt.

9 On the other hand the defendants have the right
10 to bring in any witness that they felt might be helpful
11 to their case.

12 You are asked and you are directed to decide
13 this case on the evidence, on the record made here.

14 Evidence is the method that the law uses to
15 prove or disprove a disputed fact.

16 There are two general classifications of
17 evidence: One is direct evidence and the other is
18 circumstantial evidence, sometimes called indirect
19 evidence.

20 Direct evidence is the testimony by witnesses
21 of what those witnesses saw or heard.

22 Indirect or circumstantial evidence is a
23 method of proving or disproving a disputed fact by
24 drawing reasonable inferences based on your experience
25 and common sense from established facts.

Now, that definition sounds beautiful, b

1
2 don't know whether you fully understand it because it
3 is in the abstract and so I would like to give an
4 example.

5
6 If you were sitting here as judge in a
7 personal injury action and the plaintiff A claimed
8 that the defendant B drove his car negligently and
9 struck the plaintiff A down, causing certain injuries,
10 the claim being that the defendant B passed a stop
11 sign without stopping.

12 The defendant B comes into Court says I stopped
13 and then proceeded.

14 Now, there is a contested issue.

15 The plaintiff says he zipped by without stopping
16 at the stop sign as the defendant was obligated to do
17 and B denying that, alleging that he did stop at the
18 stop sign and proceeded.

19 Let us assume my courtroom deputy, Mr. Adler,
20 and myself were standing on the corner next to the
21 stop sign at the time this happened.

22 He had his back to the stop sign and assume
23 that I was facing him and facing the stop sign and
24 the roadway.

25 If I were called to testify I would give
evidence, direct evidence of the occurrence.

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3 Let us assume that I testified that I saw B
4 driving his 1974 Cadillac at 60 miles an hour, continued
5 at 60 miles an hour, and passed a stop sign without
6 stopping at the same rate of speed and struck A,
7 knocking A down and causing the injuries.

8
9 Now that is direct evidence of that contested
10 issue.

11 You see, you must first identify the issue.

12 Now, Mr. Adler was standing there. He did not
13 see the motor vehicle pass the stop sign but he never-
14 theless could testify to other facts from which reason,
15 experience and common sense would permit you to draw
16 the inference that B passed the stop sign without
17 stopping.

18 He had his back to the stop sign, as I said,
19 but he might say that he saw B driving his car at
20 about 60 miles an hour and it was a white Cadillac.
21 He lost sight of B when he passed behind him and then
22 he turned to his right and after the motor vehicle
23 had traversed about 150 or 200 feet and two or three
24 seconds later he saw the car traveling at the same
25 speed and knocked the plaintiff down.

So what he is testifying to is that motor
vehicle traversed about 150 or 200 feet in two or three

seconds.

I think you will agree with me that from the facts established through the testimony of Mr. Adler the reasonable inference would be that the motor vehicle passed the stop sign without stopping.

The law does not regard one type of evidence as being a better quality than the other. The law says that at times circumstantial evidence is a better quality and at times direct evidence is a better quality, but the law requires the Government to prove all essential elements of the crime charged beyond a reasonable doubt on both the direct and the circumstantial evidence.

What is evidence and what is the evidence in this case, the record upon which you will make your determination?

First it is the sworn testimony of witnesses, regardless of who may have called him, the exhibits received in evidence, regardless of who may have produced them, the facts which may have been stipulated upon between the parties, the Government on the one hand and the defendants on the other, and the facts of which the Court took judicial notice of.

For example, if I said that a certain day of

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2 the month fell on a certain day of the week, that is
3 a judicially noticed fact.

4 Now, I think it is helpful for the jury to
5 understand what is not evidence.

6 Statements of counsel in the openings and
7 summations is not evidence.

8 They serve a very useful purpose, as I indicated,
9 and the openings are designed to alert the jury as to
10 what is to follow, because as you now understand
11 testimony concerning facts does not come in in any
12 logical or set pattern and if you have a broad outline
13 as to what each party alleges or the position of each
14 party, it makes it easier to follow the facts.

15 Again in summation, summation is an analysis of
16 the evidence and argument on the evidence, a presenta-
17 tion to you on the defendant's theory of exculpability,
18 which means theory removing the defendants from guilt,
19 saying not guilty, and on the other hand theories by
20 the Government of inculpability, which means theories
21 of guilt.

22 Now, the arguments may have struck your logic,
23 may have stimulated your thinking. You may think that
24 some were attractive enough to accept; on the other
25 hand you may refuse to take some or reject them all.

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2 But that is totally within your discretion and
3 good sense, but the point is that summation is not
4 evidence. It is just designed to call your attention
5 to the evidence and the thinking of the lawyers again
6 as an aid in your search for the truth.

7 Statements by counsel, random statements
8 which you may have heard in Court or anyplace else,
9 is not evidence. It is the sworn testimony of the
10 witnesses subject to cross-examination and the
11 exhibits and the judicially noted facts and the
12 stipulated facts.

13 Wherever objection to questions were sustained,
14 you may not speculate on what the answer may have
15 been, if the witness were permitted to answer.

16 It is pure speculation; not in the record so
17 you may not consider it.

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19 (Cont'd on next page.)
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Charge of the Court

Similarly, where the Court directed the reporter to strike the testimony and directed the jury to disregard it, it is not evidence. Because as I directed the reporter to expunge it from his record, so it should be expunged from your mind and your consideration.

At times the lawyers may have incorporated into their question a statement which found no support in the record. If the witness rejected that statement, said no statement of an event is a fact, you can't accept that unsupported statement as being true or as being part of the record. It was rejected by the witness and has no support in the record. It is not evidence and you must disregard it.

I should define the difference between an inference and a presumption. Now, I will be talking about a statutory inference later in the charge, and I have talked to you about presumption.

An inference is a conclusion which the jury may draw. It's a discretionary matter based on common sense and experience.

And the example of that is the method of proving or disproving a disputed fact through circumstantial evidence.

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3 A presumption on the other hand is a conclusion
4 which the jury is required to make and remains unless
5 overcome by proof to the contrary beyond a reasonable
6 doubt. And the example of that, of course, is the
7 presumption of innocence.

8 You the jurors are the sole judges of the
9 credibility of witnesses, which means the believability
10 of their testimony and the weight their testimony
11 deserves. Scrutinize the testimony given and the
12 circumstances under which each witness testified in
13 every matter in evidence which tends to show whether a
14 witness is worthy of belief. Do not credit the agents,
15 the special agents called by the Government because
16 they are special agents. They are to be treated like
17 any other lay witness. But consider the intelligence
18 of each witness, the motive and state of mind of each
19 witness.

20 Why is the witness testifying?

21 You may consider the promises that the coopera-
22 tion of the witnesses, Government witnesses will be
23 brought to the Court's attention, the hopes of the
24 witness, Mr. Noa and his motion to reduce the sentence
25 imposed in the Southern District of Florida.

You examine that testimony very carefully in the

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2 light of the motives and you decide whether it's a
3 motive to lie or to tell the truth.

4 Examine the demeanor and manner while on the
5 witness stand. Take into consideration the witness'
6 own ability to remember the matters on which the
7 witness is testifying, whether the witness shall have
8 impressed you as one having a good and accurate
9 memory of the matters on which the witnesses have
10 testified.

11 Take into consideration the relation each
12 witness bears to either side of the case, the manner
13 in which each witness might be affected by the verdict,
14 the extent to which any witness is either contradicted
15 or corroborated by other testimony and other evidence
16 in the trial.

17 Now, there was some testimony about fears that
18 those entering the country had about the declaring
19 money that they brought into the country. I charge
20 you that 39 USC Section 1101 provides, "Whoever,
21 whether as a principal, agent or bailee or by an agent
22 or bailee knowingly transports or causes to be trans-
23 ported monetary instruments from any place within the
24 United States to and or through any place outside the
25 United States, or to any place within the United States,

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2 from or through any place outside the United States,
3 or receives monetary instruments at the termination of
4 their transportation to the United States from or
5 through any place outside of the United States, in
6 an amount exceeding \$5,000 on any one occasion shall
7 file a report or reports in accordance with
8 Subsection B of this Section."

9 That statute was enacted by the Congress on
10 October 26, 1970 and the effective date of that
11 statute was April 1, 1971.

12 Now I charge you that there was no obligation
13 on behalf of anyone coming into this country to
14 declare money before April 1, 1971.

15 I also charge you that the tax laws of the
16 United States require every seller of real estate to
17 place on the conveyance or deed United States
18 revenue stamps in an amount equal to 55 cents for
19 each \$500 of purchase price over and above existing
20 mortgages. And that revenue stamp placed on a deed
21 of \$15.95 indicate a purchase price of \$14,000 to
22 \$14,500 above the existing mortgage.

23 Much of the trial time was consumed by the
24 lawyers in presenting to the witness prior state-
25 ments. Some of those prior statements presented to

1
2 the witnesses are of testimony they had previously
3 given in this trial, some of it in other trials, some
4 of it before the grand jury, some of it by statements
5 to Government agents.

6 Facing a witness with prior inconsistent
7 statements is a method of impeaching the credibility
8 of the witness. If the witness said something differ-
9 ently at one time than he is saying before you, the
10 jury is entitled to know that in weighing the credi-
11 bility.

12 There was also presented to the Government
13 witnesses the failure of a witness to say on previous
14 occasions what he said before you, the theory being
15 that if a witness failed to say something on the
16 prior occasion when under ordinary circumstances it
17 was reasonable to expect the witness to say it, it
18 might be inconsistent with the testimony he gives
19 before you.

20 It is for the jury to determine whether the
21 prior statement or the failure to say something is
22 inconsistent with the testimony he gives.

23 In doing that you should take into consideration
24 all the circumstances in making the prior statement.
25 You determine whether the prior inconsistent statement,

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2 if you so find it, is as to a material matter or an
3 immaterial matter.

4 Then, again, take into consideration all the
5 circumstances including language difficulties.

6 Now, we understand that there are certain
7 normal variations by people who intend to tell the
8 truth in retelling an event or a transaction. The
9 Government pointed out that if three people saw the
10 same thing, you wouldn't expect them to say it exactly
11 the same way.

12 I dare say, if a witness in the retelling told
13 it in exactly the same way, word for word, gesture for
14 gesture, pause for pause, you'd have reason to suspect
15 the credibility of that witness' testimony.

16 But you the jury will determine whether the
17 prior statement was inconsistent, whether the inconsis-
18 tency is a material matter and how it affects the
19 credibility of a witness.

20 Now, if you find that any witness intentionally
21 testified falsely under oath as to a material
22 matter, you may disregard all that witness' testimony
23 on the theory that the witness is unworthy of belief.

24 On the other hand, even if you find that a
25 witness intentionally testified falsely under oath

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2 you may decide to accept that portion of that
3 witness' testimony that you recognize as being
4 truthful.

5 Again, it underscores the wide discretion the
6 jury has in assessing the credibility of witnesses.

7 In this case the defendants Caceres, Castellano
8 and Fernandez took the stand and testified.

9 A defendant who wishes to testify, of course,
10 is competent to testify as a witness and you must
11 judge his testimony in the same manner as any other
12 witness.

13 The defendants Mendez and Lopez did not take
14 the stand. The law does not compel a defendant in
15 a criminal case to take the witness stand and testify.
16 No inference of guilt may be raised and no unfavorable
17 inference of any kind may be drawn in the failure of
18 the defendant to testify. The defendants as previously
19 charged may rely on the failure of the Government to
20 prove its case.

21 It would be improper for you to discuss the
22 failure of the defendants Mendez and Lopez to take the
23 witness stand.

24 The Government's case rests entirely or almost
25 entirely, substantially, on Coronel, Noa, Arenas and

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2
3 Gonzales.

4 Now, they came to the stand and said they
5 participated in the conspiracy.

6 Now, of course, their saying so, that in and
7 of itself should not be charged against these
8 defendants. That's an admission of their own
9 activity. But for your purposes in assessing credi-
10 bility all those witnesses are classified as accom-
11 plices.

12 An accomplice does not become incompetent as
13 a witness because of participation in a crime charged.
14 But on the contrary, the testimony of an accomplice
15 alone, if believed to be true beyond a reasonable
16 doubt, may be of sufficient weight to sustain a
17 verdict of guilty even though not corroborated or
18 supported by other evidence.

19 Now, I don't say whether there is or is not
20 other evidence separate and apart from the testimony
21 of these accomplices to corroborate their testimony.
22 I can think of one example for your consideration of
23 the corroboration of the testimony of Mr. Gonzales
24 and that was the hotel bills of the Century Paramount
25 Hotel.

Now, that evidence was separate and apart from

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3 the testimony of the accomplices.

4 The jury should keep in mind the testimony of
5 accomplices is always to be received with caution and
6 weighed with great care. You must examine that type
7 of testimony more carefully than any other lay witness.

8 You should not convict a defendant upon the
9 unsupported testimony of an alleged accomplice unless
10 you believe such unsupported testimony to be true
11 beyond a reasonable doubt.

12 Now, in looking for corroborative testimony,
13 the testimony of one accomplice cannot corroborate the
14 testimony of another accomplice. It must be separate
15 and independent from the testimony of the accomplices.
16 And I use the plural.

17 The testimony of a witness may be discredited
18 or impeached by showing that the witness has been
19 convicted of a felony. That is, a crime punishable
20 by a term of imprisonment for more than one year.

21 A prior conviction does not render a witness
22 incompetent to testify, but is merely a circumstance
23 which you may consider in determining the credibility
24 of a witness.

25 Again, testimony just as in accomplice testimony
must be scrutinized and weighed with greater care than

1
2 that of an ordinary witness.

3 It is the province of the jury to determine the
4 weight to be given to any prior conviction as impeach-
5 ment. The testimony of an informer who provides
6 evidence against the defendants for pay or for immunity
7 from punishment or for personal consideration must be
8 examined and weighed by the jury with greater care
9 than the testimony of an ordinary witness.

10 The jury must determine whether the informer's
11 testimony has been affected by interests or prejudice
12 against the defendant.

13 The charge in this indictment is briefly stated
14 in the memorandum of verdict. The charge set forth
15 is not intended to say everything the indictment says,
16 but it's to say enough that you can recall what the
17 indictment says.

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19 (Continued next page.)
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1 The charge in the indictment alleges that on
2 or about January and between January 2, 1968 and
3 December 31, 1970, the defendant, Teodoro Caceres,
4 Raul Castellano, Gilberto Fernandez, Amado Lopez and
5 Jose Mendez, conspired with Segundo Coronel, Manuel
6 Noa and Roberto Arenas and others to fraudently and
7 knowingly import and bring into the United States,
8 and knowingly and wilfully, receive, conceal, buy,
9 sell and facilitate the importation, concealment and
10 sale of large quantities of heroin.

11 To say it even more simply, the charge in the
12 indictment charges these defendants and others with
13 being in the heroin business during that period.

14 At this point I'd like to read the indictment
15 and I will read it exactly as it is returned. You
16 will find many names that were mentioned during the
17 testimony and you may even find some that weren't
18 mentioned. I just say that you are not to be con-
19 cerned by the fact there are other names that are not
20 before. You are to determine the guilt or innocence
21 of each defendant here on what is produced.

22 Now, again, the indictment is only an accusation.
23 You cannot in considering the guilt or innocence take
24 into consideration the statements that I am reading
25 to you. Each and every defendant said, "Not guilty."

P25

1 It reads as follows:

2 "On or about and between the 1st day of
3 January 1968 and the 31st day of December 1970, both
4 dates being approximate and inclusive, within the
5 Eastern District of New York and elsewhere, Mario
6 Bueno, Teodoro Caceres a/k/a "Teo", Luis Calabrese
7 a/k/a "Luisito", Domingo Coca, Raul Castellano,
8 Gilberto Fernandez a/k/a "Toy Toy", Raul Fernandez,
9 Roberto Diaz Jimenez a/k/a "El Gaujiro", Amando Lopez,
10 Jose Maseo, Jose Mendez a/k/a "Pepe", Raul Ortega,
11 Vincente Oritz a/k/a "Cuicaca", Dino Romano a/k/a/
12 "Luis Belmonte", John Doe a/k/a "Chino Chang" and John
13 Doe a/k/a "Fillo", the defendants, together with Manuel
14 Noa, Segundo Coronel and Roberto Arenas, named herein
15 as co-conspirators but not as defendants, and others
16 known and unknown to the Grand Jury, wilfully, know-
17 ingly and unlawfully did combine, conspire,
18 confederate and agree together and with each other
19 to violate Sections 173 and 174 of Title 21, United
20 States Code.

21 1. It was part of said conspiracy that the
22 defendants and co-conspirators fraudulently and know-
23 ingly would import and bring into the United States
24 large quantities of heroin, a narcotic drug, contrary
25 to law.

1 "2. It was further a part of said conspiracy
2 that the defendants and co-conspiratory wilfully,
3 knowingly and unlawfully would receive, conceal, buy,
4 sell and facilitate the transportation concealment and
5 sale of large quantities of heroin, a narcotic drug,
6 after the narcotic drug had been imported and brought
7 into the United States, knowing the same to have been
8 imported and brought into the United States contrary
9 to law.

10 "3. It was further a part of such conspiracy
11 that the defendants and co-conspirators would conceal
12 the existence of the conspiracy and would take steps
13 designed to prevent disclosure of their activities."

14 I am about to read the statutes upon which the
15 indictment is based, but I will take just a moment or
16 two to just generally describe the nature of a crime.

17 There are two ingredients: 1, what we call
18 criminal intent, and then the proscribed, the pro-
19 hibited conduct.

20 You will recall from what I read, the charges
21 that the defendant knowingly and wilfully and unlaw-
22 fully entered into the conspiracy, that the heroin was
23 wilfully, knowingly and unlawfully imported.

24 Well, knowingly and wilfully connote the
25 criminal intent. Knowingly means that the accused

1 was aware that what he did, he did not do inadvertently,
2 through mistake or ignorance.

3 Wilfully means that being aware of what the
4 accused was doing, that the accused nevertheless did
5 it intentionally violating the narcotics laws.

6 The Government doesn't have to prove that he
7 knew that he violated a specific section, but knew
8 that he was violating the Federal Narcotic Laws.

9 Now, the section upon which this is based,
10 Section 173, prohibits the importation of heroin with
11 certain very limited exceptions that aren't pertinent
12 here, and I am reading from 21 United States Code
13 Section 173, and I will read Section 174. You will
14 find that noted in your memorandum of verdict.

15 The congress says what is a crime. Most of
16 the Congressional Statutes have been codified in many
17 books and under many titles. Here it says Food and
18 Drugs. The other section I read from 31 U.S.C.
19 Section 1101 is entitled Money and Finance. There is
20 no mystery to the numbers, you see.

21 It says in part, it is unlawful to import any
22 narcotic drug into the United States or any territory
23 under its control or jurisdiction.

24 Now, as I say, that statute is absolute in
25 its language except for the limited exception which I

1 shall not bother with here.

2 Section 174 defines the crime and it says the
3 following in part.

4 "Whoever fraudulently or knowingly imports or
5 brings any narcotic drug into the United States or any
6 territory under its control or jurisdiction contrary
7 to law, or receives, conceals, buys, sells or in any
8 manner facilitate the transportation, concealment or
9 sale of any such narcotic drug after being imported or
10 brought into the United States contrary to law, or
11 conspires to commit any of such acts," is in violation
12 of the laws of the United States.

13 There are a number of crimes described in that
14 portion of the section that I read. The importation
15 is one, and the buying, selling, transporting,
16 facilitating the transportation of a narcotic drug is
17 the other.

18 We call those substantive crimes, the doing of
19 those prohibited acts knowingly and wilfully.

20 The defendants are not charged with the sub-
21 stantive crimes. They are charged with conspiring,
22 as the section says, "to commit any of such acts."
23 In other words, the prohibited conduct, what the
24 Congress says you shall not do, and if you do,
25 constitutes a crime, is the entering into the business.

1 I charge you that heroin is a narcotic
2 used in the statute. It is not necessary, it is
3 essential for the Government to prove that an actual
4 sale was completed.
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8 (Cont'd on next page.)
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Charge of the Court

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THE COURT: (Continuing) The Government need not prove that there was transportation or facilitation of transfer. Again, it is the conspiracy to do those prohibited acts, that is the crime charged here.

What is a conspiracy? It is an agreement between two or more individuals to commit an unlawful act. Those who are members of the conspiracy are called conspirators. A conspiracy is a kind of a partnership in a criminal venture in which each member of a conspiracy becomes the agent of every other member during the term of the conspiracy and while performing the duties of the conspiracy which means engaging in the enterprise.

The mere association of people, the mere similarity of their conduct does not prove a conspiracy. People have the right to assemble. People have the right to discuss matters. If you find that a member of the conspiracy, like Mr. Noa, -- if you find a conspiracy existed -- Mr. Noa or Mr. Coronel or Mr. Gonzalez were **members** of that conspiracy, the mere association of a defendant with any of those conspirators is not enough. The mere fact that Gilberto Fernandez, also known as Toy Toy, met

P31

Coronel, who was a member of the same region with him, had met Mr. Noa on frequent occasions, their families met, is not enough. That he had seen Arenas a few times, is not enough.

Even if it is shown by the proof that he associated with these people knowing that they were in a criminal conspiracy, dealing in heroin, is not enough to bring the defendant Fernandez in the conspiracy.

The Government must prove that the defendant Fernandez knowingly participated in the conspiratorial activities; driving Mr. Noa to the Bronx Terminal is not participation. Driving Mr. Noa to a customer for the purpose of delivering heroin or collecting money for the sale of heroin is not enough if the Government does not prove beyond a reasonable doubt that Fernandez at the time knew the purpose of the trip.

In order to bring Mr. Fernandez into the conspiracy, if the Government establishes a conspiracy, the Government must prove beyond a reasonable doubt that he was aware of the activities of the criminal nature of the conspiracy and that he performed services on behalf of the business, knowingly and wilfully.

1 and that he did it intending to perform the acts that
2 he did, knowing that he had violated the narcotics
3 laws.
4

5 On the other hand, the Government need not
6 prove that the members entered into a formal, express
7 agreement, that they sat down and said, "Well, now,
8 we are in business, this is the structure of the
9 partnership and this is what each one will do and
10 these are the purposes." It is not necessary to show
11 that they agreed on all of the objects of the con-
12 spiracy.

13 All that the Government must prove, in order to
14 prove the guilt of an accused, is that the members
15 in some way or in some manner, and it could be in the
16 manner in which they dealt with each other, the
17 Government must prove beyond a reasonable doubt that
18 the members in some way or in some manner or through
19 some contrivance, positively or tacitly came to a
20 mutual understanding, to try to accomplish a common,
21 unlawful plan, in this case an understanding to deal
22 in heroin.

23 The Government need not prove that all the
24 means and methods set forth in the indictment were
25 agreed upon nor that all the means that were agreed

Charge of the Court

upon were actually used.

What the evidence must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed. Again, "knowingly" means that the parties were aware of what they were dealing with, and that they were dealing in heroin. That they were entering into the conspiracy to deal in heroin, and that one or more of the means described in the indictment was agreed upon to be used in an effort to effect or accomplish the object or purpose of the conspiracy as charged in the indictment.

One may be a member of a conspiracy without full knowledge of all of the details of a conspiracy. On the other hand, a person who has no knowledge of the conspiracy, but happens to act in a way which furnishes or advances some purpose or object of the conspiracy does not become a member of the conspiracy thereby.

In other words, participation must be voluntary, knowing and intentional. In other words, the accused, the proof must show that the accused knew he was in the business of dealing in heroin and the Government must prove that beyond a reasonable doubt, and that he wilfully entered into that conspiracy.

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2 If you find the Government proved beyond a
3 reasonable doubt that the defendant understanding
4 and knowing the unlawful character of the plan decided
5 to assist and participate in the scheme in order to
6 advance the business of the conspiracy, and again
7 he does that knowingly and wilfully, he becomes a
8 wilfull participant and he becomes a conspirator.

9 In determining whether a conspiracy existed
10 the should consider the actions and declarations
11 of all of the alleged participants. However, in
12 determining whether a particular accused became a
13 member of the conspiracy, the jury should consider
14 only the acts or statements or conduct of that accused
15 as given and offered through the testimony of witnesses.

16 The theory again is one of personal criminal
17 liability. I have charged you throughout this trial
18 about where an accused, who is not present at a
19 conversation and a transaction, can be bound by the
20 acts or declaration of a co-conspirator. That's a
21 question of evidence; how to treat the evidence.

22 Conversations between Noa and Coronel, between
23 Noa and Coronel and Arenas, outside the presence of
24 these defendants, could not bind any of these
25 defendants, unless and until it is proven beyond a

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2 reasonable doubt that the conspiracy existed, that
3 Coronel, Arenas, Noa were members of that conspiracy,
4 that the conversation was in the business of the
5 conspiracy, to advance its purposes and during the term
6 of the conspiracy, thereupon the accused, whom you
7 find my proof beyond a reasonable doubt knowingly and
8 wilfully entered into the conspiracy is bound not
9 not before you find that the accused entered into the
10 conspiracy.

11 That is where we get the personal criminal
12 liability, the personal responsibility for an accused's
13 acts.

14 Now, in order to bring any accused into the
15 conspiracy, it is not conversations between Noa
16 and Coronel or Arenas and Coronel that may have
17 mentioned the others or any of the others. No! It
18 is the testimony of these witnesses when they say,
19 "I delivered heroin to the defendant A or the
20 defendant B. I collected money from Defendant B.
21 Defendant C brought money to me."

22 If you credit that testimony, that is the
23 testimony that you may use to consider whether the
24 Government has proved that an accused knowingly and
25 wilfully entered into a conspiracy.

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2 We talked about a conspiracy like a
3 partnership in legitimate business and it may be that
4 the concept of partnership is everybody working
5 together doing the same work and sharing the profits
6 equally, in any kind of a business.

7 Well, actually in legitimate partnerships there
8 are different types of partnerships, too. There are
9 limited partnerships and I don't want to bring in
10 any matter tht might confuse you but not every
11 partnership in a legitimate business has equal profits
12 equal participation, everybody doing the same work.
13 It is not like your local delicatessen man, when you
14 see three men working behind the counter and you know
15 them, all partners working the same time, all cutting
16 the same bologna at different times.

17 The partnership that we have here is a chain
18 conspiracy. In a chain conspiracy, conspirators
19 work at different levels. Here I suggest that the
20 theory of the Government -- and I do not give the
21 theory any substance, I just do it by example -- the
22 theory is that Florenzo Gonzales and Dino Romano were
23 the importers, that they delivered the heroin in hand
24 to Mr. Coronel or on one or two occasions the evidence
25 is that someone else, Ortega or someone picked it up
with Arenas.

1
2 Now, this conspiracy involves only the heroin
3 that Coronel received, and then distributed to Manuel
4 Noa and I believe on occasion, one or two others,
5 possibly Raul Ortega, and there Noa is performing at
6 a different level than Coronel. Each one in his
7 own private enterprise but part of this conspiracy and
8 dealing only in Coronel's heroin.

9 And then, Mr. Gilberto Fernandez assisted
10 Noa in his operation when he received -- when Noa
11 received the heroin from Coronel. And that the
12 other defendants, Caceres, Costellano Lopez and Mendez
13 were purchasers of heroin from Noa and I think on
14 one or two occasions from one of the defendants, I
15 think from Coronel, if I remember correctly.

16 Again, do not accept my recollection of the
17 evidence as the gospel. My recollection is just as
18 faulty as yours and probably there are a few on this
19 jury who have a much better recollection than I have,
20 so use your own memory. I just want to give the
21 example and try to flesh out the theory as to what
22 type of conspiracy is charged here.

23 Now, it is not necessary for the Government
24 to prove that the defendants ever knew or saw each
25 other. It is necessary for the Government to prove

Charge of the Court

beyond a reasonable doubt that the accused knew and understood that the success of his operation in dealing in heroin depended on others, on importers, on distributors, on men like Coronel and Noa, for their own success.

The indictment charges this single conspiracy. Whether a conspiracy existed, whether the evidence shows that there was more than one conspiracy, who the members of the conspiracy are, are questions of fact for your determination. There is some evidence that Noa received heroin from others, and received other drugs.

The importance of this to you is first, to impeach Noa's testimony, and secondly to make certain that you understand that if Noa or anyone else was acting as a conspirator in another conspiracy, what Noa or anyone else said in that other conspiracy, promoting that other conspiracy, could not possibly bind any of these defendants unless you find one or more of the defendants was acting in the dealing of the other conspiracy.

I will show you the limited effect it would have on the accused here. In rebuttal, the Government offered evidence through Mr. Gonzalez of other crimes.

Now, again, whether you believe the testimony of Mr. Gonzalez is solely up to you but if you believe the witness, Romiro Gonzalez who testified that he discussed the sale of heroin with the defendant Lopez and Lopez drove the car in which the heroin was concealed, that the deal fell through when Lopez and Gonzalez failed to agree on the price of the sale of heroin. Gonzalez also testified that he bought three kilograms of cocaine from Noa and Ortega and that Fernandez delivered the cocaine to Gonzalez.

Now, that testimony is not within the purpose, the objectives of the conspiracy charged and it is here for a very limited purpose. It is important for you to know that limited purpose.

One of the elements of the crime charged is criminal intent. The Government charges the defendant Lopez and Fernandez with knowingly and wilfully entering into this conspiracy, in this charge, and you may use the testimony of the other crimes on the issue of criminal intent.

If you credit the testimony, but you do not consider the evidence as indicating criminal intent to enter the conspiracy charged here, then disregard the evidence, it may not be used for any other purpose.

11

Charge of the Court

Now, I will be about fifteen or about twenty minutes, but if you feel tired and you would like a recess, do not be ashamed to say so.

Do you think you can go on, because I am no different than the other lawyers when I said that it is not easy to listen and I recognize that.

(continued next page.)

Reel 2
WS.

1
2 So, there is no rush for the doors out of the
3 courtroom, I will continue.

4 There are three essential elements of the prime
5 charge: One, that the conspiracy described in the
6 indictment was knowingly and wilfully formed and was
7 existing at or about the time alleged for the purposes
8 stated.

9 That means that the Government must prove beyond
10 a reasonable doubt that the conspiracy alleged existed.

11 Second, that the accused wilfully became a member
12 of the conspiracy.

13 Now, I discussed this before with you but I am
14 going to do it again: Proof of wilfullness requires
15 the Government to prove that the accused became a member
16 of the conspiracy knowing that the conspiracy knowing
17 that the conspiracy was formed for the purpose of
18 dealing in heroin, that it was imported into the United
19 States contrary to law and that the accused entered into
20 the conspiracy knowing that the importation of heroin
21 was illegal.

22 Third, that one of the conspirators thereafter
23 knowingly committed an overt act in pursuance of the
24 agreement and in furtherance of some object or purpose
25 of the conspiracy.

Now, proof of the substance in which the testimony, if you credit it, indicates the conspiracy dealt in, may be shown by circumstantial evidence.

You may take into consideration the pertinent circumstances on that issue.

You may for example take into consideration the secrecy through which the dealings were conducted, the price paid for the substance.

Section 174 has a provision that I have not yet read that aids the Government in establishing criminal intent, knowledge that the heroin was illegally imported and knowledge that the defendant knew it was illegally imported. It says this:

"Whenever on a trial for violation of this section the defendant is shown to have or have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

Now, the Government must prove beyond a reasonable doubt if you find that a conspiracy existed that he knew and understood that the heroin was imported and that it was unlawful to import heroin.

The provision I just read in effect says that if

1 the Government proves beyond a reasonable doubt that
2 a defendant was in knowing possession of heroin,
3 in other words that the defendant, the accused knew
4 that he was in possession of heroin, from that finding,
5 unless unexplained to the satisfaction of the jury,
6 the jury may, it does not say must, the jury may
7 infer one, that the heroin was imported or brought into
8 the United States contrary to law and, two, that the
9 accused knew that the heroin was imported or brought
10 into the United States.

11 This permissible statutory inference of course
12 is not binding upon you and you may refuse to draw
13 that inference.

14 It is the Government's burden to prove beyond
15 a reasonable doubt that a defendant against whom the
16 inference may be drawn possessed heroin.

17 The defendant is under no obligation to explain it.
18 If he does not explain it, you may draw the inference,
19 but you may find the explanation in the record itself.

20 You must remember that the defendant has a
21 constitutional right, and I am referring particularly
22 to defendants Mendez and Lopez, who did not take the
23 stand, not to take the stand.

24 This permissible statutory inference sh
25

2 in any way detract from that right, not to take the
3 stand.

4 The defendant may still rely on the Government
5 to prove its case. What this says is only that it is
6 an inference that may be drawn in support of the
7 Government's case, if it is not explained to the satis-
8 faction of the jury.

9 Now, I talk about acts and conduct of one
10 conspirator, that is attributable to others. It doesn't
11 hold true in this case, and again this is a question
12 of criminal liability that flows from proof beyond a
13 reasonable doubt of knowing possession of heroin and
14 it is only if the Government proves beyond a reasonable
15 doubt that the accused had the heroin in his possession,
16 that you may draw that statutory inference.

17 What is possession? Possession is actual or
18 constructive.

19 I have these glasses in my hand. I have actual
20 physical control and domination of the glasses.

21 If they were at my opticians being fixed, I would
22 have the right to possession. If they were in my
23 chambers, I might very well send my courtroom deputy
24 for them. That is constructive possession. Not
25 having actual physical control, direct control over

1
2 them, but the power to dispose of it.

3 Nevertheless, when we talk about possession and
4 in this case it would be, for example, if you believe
5 the evidence that I think indicated at times, Noa had
6 in his possession under his direct control heroin. It
7 was Coronel's heroin that the testimony shows was
8 distributed at Coronel's direction; so Noa had physical,
9 actual, direct control and Coronel had not.

10 Coronel had constructive possession. Possession
11 may be possession by one or may be possessed by more
12 than one.

13 Now, you will shortly be excused to deliberate
14 on the matter before you. Do not consider possible
15 punishment. That is a matter for the Court. Your
16 oath and your duty refer to consideration of the
17 evidence in accordance with the charge of the Court
18 to determine the guilt or innocence of each defendant
19 free of all bias, prejudice or sympathy and in
20 accordance with the law as I charge it.

21 During your deliberations you may have occasion
22 to ask the Court questions. Do not ask me what a
23 witness said. You see, if I told you my version of
24 what a witness said, that would be trespassing on your
25 prerogative and a fair trial can only be accomplished
if all of us understand the obligation of all the

participants in the trial.

If you ask for testimony, I will read it to you and then you decide what was said.

Now, this trial, as we all recognize, was over a period of weeks and we have the transcripts and you will remember there was direct, cross and there was redirect and recross and re-redirect and re-recross, and so the testimony on the subject matter can be spread over more than one volume of transcript and it takes a lot of time to find what you want, so I want you to be precise as possible in telling me what testimony you want to hear. It will be my purpose to give you only what you are asking for so that I won't be charged with favoring one side or the other.

Now, sometimes it is difficult knowing just what you want to hear. You may identify it by the name of the witness or the subject matter or you may identify it by the cross, you may identify it by the cross of a particular defendant's counsel. Those are some of the methods. Try to be precise. The same thing goes for exhibits. I won't send the exhibits in, but if you say we would like all the exhibits and, incidentally, all the notes will come through your Foreman, through the Marshal and to me.

1

Charge of the Court

I will send all the exhibits in. If you want to see just specific exhibits, then be specific and I will send those exhibits in.

During your deliberations, don't tell me how you stand at any time in the voting. The verdict is not the verdict in this case until I learn that all the jurors agree. When all the jurors have agreed, I will call the jury into court and I will ask the foreman to stand and in effect I will say, United States against, naming all the defendants, how do you find the defendant Theodoro Caceres.

I notice in that line it's an E on the end, but that doesn't matter. He's identified, also known as Teo, guilty or not guilty. And the Foreman will render the verdict.

Then, how do you find the defendant Raul Castellano, guilty or not guilty. And you will give me the verdict.

How do you find the defendant Gilberto Fernandez, guilty or not guilty, and you will give me the verdict.

How do you find the defendant Jose Mendez, guilty or not guilty, and then you will give me the verdict. And then the Foreman will sit down. I will turn to Juror No. 2 and say in effect, you heard the verdict

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1 2
2 as rendered by the Foreman. Is that your verdict. And
3 if Juror No. 2 says yes, I will go to 3 and so forth
4 up to 12. And if all agree in open court and it is
5 recorded, then for the first time it becomes the verdict
6 in this trial. Not before.

7 So if you have arrived at a verdict, I want the
8 note to say, "We have arrived at a verdict."

9 Don't say to me at any time, we are six to six,
10 eight to four, ten to two or anything like that.

11 Now, there is nothing official about this
12 document called memorandum of verdict. You might want
13 to use it for scrap paper. The only form I would take
14 is that at the end of the trial after the verdict is
15 rendered in open court, I would ask the Foreman to
16 sign his copy. So we will give him an extra copy
17 so he can mark up one and sign the second one.

18 The deliberations by the jury is a process
19 designed to bring about discussion of the evidence.
20 In an attempt to arrive at a unanimous verdict it
21 would be wrong for a juror to take an intransigent
22 view and to refuse to discuss the evidence with his
23 other jurors. You cannot say, "Well, my name is John
24 Smith and I have already arrived at a verdict. Don't
25 talk to me. When you are ready to come around to my

way of thinking, let me know."

That is the extreme, of course, and I don't expect it at all. But that's wrong. It's equally wrong for a juror to come into the jury room and say, "You know, they call me Grand Old Fellow Charlie. Never get into an argument, never get into a fight. I will go along with anything you say. Just tell me when you have agreed."

That's wrong, too. The parties are entitled to 12 individual verdicts arrived at unanimously through full discussion of the evidence.

Now, I will excuse the jury. Don't start your deliberations. I just want to talk to the lawyers for a few moments. The jury is wexcused.

(Whereupon, the jury retired from the courtroom.)

THE COURT: Mr. Soltz?

MR. SOLTZ: No exceptions on the part of the defendant Mendez.

THE COURT: Mr. Lashley.

MR. LASHLEY: No exceptions on behalf of the defendant Caceres.

THE COURT: Mr. Noguerras.

MR. NOGUERAS: Your Honor, although your Honor probably covered it slightly, there are two instructions

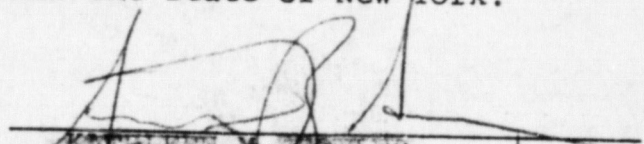
AFFIDAVIT OF SERVICE

76-1056

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

~~STUART R. SHAW~~ being duly sworn, deposes and says, that deponent is not a party to the action, is over the age of 18 years of age and resides at. ~~STUART R. SHAW~~ ST New ~~YORK~~

That on the 14th day of May 1976, deponent served the within Brief for App/Deft., upon David DePetrus, Esq., Assistant United States Attorney for the Eastern District of New York, at 225 Cadman Plaza East, Brooklyn, New York, the address designated by said attorney for that purpose by deposing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.


STUART R. SHAW

Sworn to before me this

14th day of May, 1976

JEROME ALLAN LANDAU

NOTARY PUBLIC-STATE OF N.Y.

N.Y.COUNTY: expir. -3/30/77

